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THE UNIVERSITY OF ALBERTA

A CANADIAN LEGAL PERSPECTIVE ON SELECTED ADMINISTRATIVE PROCESSES IN EDUCATION

by

Robert McLeod Paton

A THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled A CANADIAN LEGAL PERSPECTIVE ON SELECTED ADMINISTRATIVE PROCESSES IN EDUCATION, submitted by Robert McLeod Paton in partial fulfilment of the requirements for the degree of Master of Education.

ABSTRACT

The intent of this thesis is to apply Canadian law to selected processes inherent to the discipline of educational administration. The Canadian administrator has been able to look to the vast quantity of research which has emanated from the The United States. While such research has been valuable in the sense that it has increased awareness of legal impact upon administrative practices, yet, such research can be misleading simply because the American and Canadian legal contexts differ. The Canadian legal scene is unique to Canada.

Specifically the processes of:communication, decision-making and provision of educational programs are portrayed within a framework of selected aspects of Canadian law. The law of libel and slander is described as it relates to the process of communication. The principles of administrative law are applied to the decision-making processes relevant to education. The legal concept of administrative mal-practice is speculated upon as it relates to the process of providing educational programs.

This thesis concludes by noting implications of importance to the practicing administrator. Specific practices are recommended so that educational administrators can practice their profession both within the spirit and the letter of Canadian law.

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Chapter 1

THE DEVELOPMENT OF THE STUDY

Introduction

The processes, tasks and operational areas inherent to the discipline of administration in general, and educational administration in particular, have previously been researched, identified, analyzed and categorized (Miklos, 1968).

Miklos considered the generalized principles of administration by referring to earlier writers such as: Fayol, Gulick, Newman, Sears, Litchfield and Gregg. He applied those principles specifically to the discipline of educational administration. It is clear that those principles as applied by Miklos (1968) have evolved both from considerations of research data of an empirical nature and from considerations derived by way of conceptual analysis. I will suggest in this study that a further consideration is basic to an understanding of the discipline of educational administration.

That consideration is, quite simply, that members of society live under and are equally subject to the rule of law. Indeed, that consideration is fundamental to the concept of a law-abiding society and it is within a law-abiding society that educational administrators practice their art. It follows that educational administrators must develop an appreciation of the rule of law and its legal framework as they effect administrative actions.

The mystique of the law has tended to make knowledge of it a prerogative of lawyers only. Yet the law assumes that no person is ignorant of it and rejects the plea of ignorance of the law as an excuse. This study will consider the rule of law in Canadian educational context as it imposes a legal framework upon the performance of tasks selected as important to the practice of educational administration. In particular, this study will consider the tasks of communication, decision-making and provision of educational programs and relate specific aspects of the rule of law to their performance.

Statement of Purposes

1. To develop sensitivity to and awareness of the concept of rule of law as it pertains to selected processes of educational administration.

2. To describe the legal meaning and the legal significance to educational administrators of selected aspects of the Canadian law of libel and slander.

3. To describe the legal meaning and the legal significance to educational administrators of selected aspects of Canadian Constitutional law.

4. To describe the legal meaning and the legal significance to educational administrators of selected aspects of Canadian Administrative law.

5. To frame the educationally relevant communicative tasks of originating, maintaining, receiving and transmitting of information within selected aspects of the Canadian law of libel and slander.

6. To frame the educationally relevant decision-making tasks of hearing, considering and deciding within selected aspects of Canadian Constitutional Law and Canadian Administrative Law.

7. To frame the educationally relevant tasks of the provision of learning services within selected aspects of Canadian tort law.

8. To formulate recommendations for educational administrators in performance of the selected communicative, decision-making, and program provision tasks.

Significance of the Study

A perusal of earlier studies concerned with the legal aspects of educational administration reveals that little has been written in Canadian context. On the other hand it is true that a great deal of writing has emanated from the United States on matters of educational law. Such writing has tended to define the constitutional rights of students, teachers, administrators, parents and the public in general. The Constitution of the United States is very different from that of Canada as will be noted later in this thesis. It follows that the conclusions and impacts of studies framed in the law of the United States are simply not apropos to the Canadian educational scene. The first significance of this study is that it looks to the impact of Canadian law as it relates to the practices of educational administration in a Canadian context.

Those previous studies which have considered educational concerns within Canadian law have tended to note specific rules of

law as they relate to status, legal capacity, jurisdictional issues, and legal rights of students, teachers and school boards respectively. The approach of those studies was a valid and necessary one and will be the subject of further elaboration as the literature is reviewed in a latter portion of this chapter.

A second significance of this study is that it concerns itself, not with topics of status, rights, or jurisdiction, but rather that its major concern is a concern with processes and tasks of educational administration.

The problem of administrative abuse in general and in education in particular is what gave rise to the numerous studies developed in the United States. There is no reason to suspect that administrative abuse stops at the border between Canada and the United States. Indeed, there is no reason to suspect that the existence of administrative abuse is a new phenomenon. Mill noted (1859:12):

> The disposition of mankind, whether as rulers or as fellow citizens, to impose their opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power; and as the power is not declining, but growing, unless a stronger barrier of moral conviction can be raised against the mischief, we must expect, in the present circumstances of the world, to see it increase.

This problem of administrative abuse will remain with us for as long as the administrative process is conceived as a law unto itself. A third, and perhaps most significant aspect of this study is therefore that it emphasizes to educational administrators that the rule of law provides remedies to those who suffer as a result of

abuse, or unlawful exercise, of administrative decision-making powers.

This study is significant in three ways:

1. That the major theme of impact of Canadian law as it relates to Canadian administrators practicing their art in Canadian context is explored.

2. That selected processes and tasks inherent to the practice of educational administration are explored.

3. That the processes and tasks of educational administration occur within the concept of rule of law is emphasized.

Design of the Study

The theoretical basis of this study evolves from two very fundamental ideas. The first of these is, simply, the idea of administrative process-task relationships as described by Miklos (1968). The second, and more fundamental idea, is the concept of rule of law as one of the determinants of administrative behaviour. Each of these two ideas will be defined and developed in a following portion of this chapter devoted to reviewing relevant literature.

If each of these basic notions were to be seen respectively as a single straight line, then the design of this thesis can be described as a study of those two lines as they relate to one another at the point of their intersection.

Specifically, the process of communication with its tasks of receiving, maintaining and transmitting information; the process of decision-making with its tasks of hearing, considering and deciding ; the process and its tasks of providing educational

programs are considered within the concept of rule of law as it applies to the Canadian educational scene.

The "Rule of Law" concept is fundamentally a presupposition that all persons and all institutions within the state are equally subject to the rule of law. The concept does not presuppose that the rules of law treat all as equal. Clearly, law distinguishes the legal rights of the master from those of the servant. In an educational context, the legal rights of the student, the teacher, the educational administrator, the parent, the tax-payer, the school board and the various levels of government are simply not equal. The concept of "Rule of Law" presupposes a legal obligation, equally shared by all, to live within that law. In brief, all components of the educational world share an equal obligation to act within the law.

The design of this thesis features a developmental sequence of Chapters Two, Three and Four. Each of those chapters emphasizes a different perspective of the legal reasonings of Canadian law upon selected processes inherent to educational administration. Chapter Two emphasizes a description of the law of libel and slander as it relates to communication. Chapter Three emphasizes the application of administrative law to decision-making. Chapter Four emphasizes legal speculation as to negligence in provision of education programs.

This sequential design is developmental in nature inviting the reader to enhance his sensitivity to the impact of rule of law by providing exposure to the processes of legal description, legal application and legal speculation.

The methodology used throughout this thesis is to note the law as it becomes apparent by a study of actual cases. Such law is then applied to the processes and tasks which have been selected for study. The usual legal method for case reference is utilized.

To clarify and understand this notation method the reader should examine page (21) under the heading of "Defamation." The notation Cave J. Scott v Simpson (1882) 8 Q.B.D. 503 translates to mean that the name of the parties in litigation were Scott (plaintiff) and Simpson (defendant) and that the trial of the action occurred in 1882 and was reported in Volume 8 of the Queen's Bench Division law report at page 503. The name of the judge making the judgement was Justice Cave.

In summary, the theoretical base for this thesis evolves from the impact of rule of law upon selected tasks inherent to educational administration in Canada. The format and approach is developmental in its emphasis which goes from mere legal description, through application, to a point of legal speculation. The methodology is to note Canadian cases and to consider the performance of selected tasks within the legal framework suggested by such cases.

Definition of Terms

The terminology used in this study is not given any unusual connotations. If any special or unique meaning is to be applied then such clarification will be made in the text at such point that it is

required.

This study does make use of certain basic legal concepts. Definitions will be offered throughout the text for purposes of explanation.

The source of each legal definition, be it statuatory in nature, or derived from common law or by way of scholarly legal comment, will be noted in each case. Some of the basic definitions of Black's Law Dictionary as utilized in this study include:

ADMINISTRATIVE LAW. That branch of public law which deals with the various organs of the sovereign power considered as in motion, and prescribes in detail the manner of their activity, being concerned with such topics as the collection of the revenue, the regulation of the military and naval forces, citizenship and naturalization, sanitary measures, poor laws, coinage, police, the public safety and morals, etc.

CASE LAW. The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

CERTIORARI. The name of a writ of review or inquiry. Certiorari is an appellate proceeding for re-examination of action of inferior tribunal or as auxiliary process to enable appellate court to obtain further information in pending cause.

COMMON LAW. As distinguished from the Roman law, the modern civil law, the canon law, and other systems, the common law is that body of law and juristic theory which was originated, developed, and formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock.

As a compound adjective "common-law" is understood as contrasted with or opposed to "statutory," and sometimes also to "equitable" or to "criminal". See examples below.

COMPETENT. Duly qualified; answering all requirements; having sufficient ability or authority; possessing the requisite natural or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit.

COMPETENT AUTHORITY. As applied to courts and public officers, this term imports jurisdiction and due legal authority to deal with the particular matter in question.

CONSTITUTIONAL LAW. (1) That branch of the public law of a state which treats of the organization and frame of government, the organs and powers of sovereignty, the distribution of political and governmental authorities and functions, the fundamental principles which are to regulate the relations of government and subject, and which prescribes generally the plan and method according to which the public affairs of the state are to be administered.

DAMAGE. Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural - "damages " - which means a compensation in money for a loss or damage. An injury produces a right in them who have suffered any damage by it to demand reparation of such damage from the authors of the injury. By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another.

DAMAGES. A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or right through the unlawful act of omission or negligence of another.

SPECIAL DAMAGES. Those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions.

SPECULATIVE DAMAGES. Prospective or anticipated damages from the same acts or facts constituting the present cause of action, but which depend upon future developments which are contingent, conjectural, or improbable.

DECLARATORY JUDGMENT. One which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done.

MANDAMUS. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

NATURAL LAW. This expression, "natural law," or jus naturale, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral and physical constitution.

PREROGATIVE WRITS. In English law, the title is given to certain judicial writs issued by courts only upon proper cause shown. The use of the term "prerogative", in describing them, amounts only to a reference to their origin and history. These writs are the writs of mandamus, procedendo, prohibition, quo warranto, habeas corpus, and certiorari.

An extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction.

REMEDY. The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.

STARE DECISIS. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.

STATUTABLE, or STATUTORY. That which is produced or governed by statute law, as opposed to the common law or equity. Thus, a court is said to have statutory jurisdiction when jurisdiction is given to it in certain matters by act of the legislature.

TORT. A private or civil wrong or injury. A wrong independent of contract.

Delimitations

This study is delimited in its application to the Common Law provinces of Canada, which excludes the Province of Quebec. The relevant sections of the Quebec court code are considered simply to clarify the common law concepts. A further delimitation clearly lies in the fact that only certain administrative processes and tasks are considered.

Clearly the laws of libel and slander, the concepts of administrative law and questions of negligence represent only a small part of that body of law which relates to administrative practices and behaviours of educational administrators. Similarly, the processes of communication, decision-making and influencing are only three of the seven process components noted by Miklos (1968). I have considered in this thesis only what I felt to be three processes of importance to educational administrators and framed those processes within what I further felt to be relevant legal issues of importance.

Limitations

Many of the comments made in this study must be considered as opinion. All questions of legal interpretation find their final authority in the courts as they decide the issues in actual cases. Statute law impinges upon case law and to the extent that statute law has not been considered fully a limitation to this thesis results.

Assumptions

This thesis assumes that educational administration is a discipline with its own body of knowledge which gives rise to specific processes and tasks required to be performed by educational administrators.

This thesis assumes that the processes and tasks of educational administration are to be performed within a law abiding society.

Review of Relevant Literature

It is of interest to note that previous major studies of impact of Canadian law upon educational matters have not reviewed the earlier research. The reason for this state of affairs is simply that there was, and still is, a very limited quantity of educational research dealing with Canadian legal issues.

That research which has been published can be summarized by looking to the research of Bargen (1961) and Enns (1961). Both of these researchers studied Canadian educational matters concerned with questions of legal jurisdiction, legal capacity, legal rights

and legal status.

The study of Enns (1961:2) is very relevant to this thesis in two respects. Firstly, his identification of the legal sources of power for Canadian school systems remains valid:

> The structure and operation of Canadian public school systems derives chiefly from five sources:
>
> (a) The constitutional provisions laid down by the B.N.A. Act of 1867, and the subsequent Acts of Union and Orders-in-Council admitting the provinces to the Canadian confederation after 1867;
>
> (b) The statutes enacted by the legislatures of the provinces' of Canada;
>
> (c) The administrative rules and regulations of the provincial departments of education;
>
> (d) The rules and regulations of local school boards enacted through resolution or by-law of the board;
>
> (e) The decisions of the Courts in litigation brought before them.

Secondly, Enns (1961:3) describes the very unique nature of Canada's present constitution. His conclusion is simply that it differs significantly from that of the United States.

> A nation's constitution may be largely written and preserved in documentary form, largely unwritten and preserved in traditional and customary usage as exemplified by Court precedents and social practice, or it may be a combination of both--partly written and partly unwritten.
>
> The constitution of the United States is an example of the first type. In written form it insures a high degree of permanence in the basic rights and principles which it lays down. Although amendments to such a constitution are possible, a nation does not tamper lightly with its fundamental law and therefore a written constitution guarantees a high degree of stability.

The same author (1961:4) continues.

> The British constitution, as an example of the second type, is largely unwritten and depends mainly upon the body of legal precedent accumulated over the years....
>
> The Canadian constitution represents a compromise between the two extremes cited. Although the British tradition of common law is very strong in Canada, the young nation with an extremely heterogeneous population, unique geography and socio-political pattern, could not entrust its supreme law to a completely unwritten form. Thus Canada has a constitution partly wirtten in the B.N.A. Act and its amendments, and partly unwritten in English common law.

This research of Enns is relevant to this thesis for it leads to the logical conclusion that the constitutional framework of the United States as it relates to educational matters in that country is not a relevant framework for matters of Canadian education concern.

Bargen's study (1961) was limited to questions of legal status in general. In particular it considered the status of the student as the law defined it in terms of negligence. In brief, Bargen (1961) established that a duty was owed by educational officials to students and that a breach of such duty could lead to legal consequence by way of an action for negligence. That point of Bargen's study provides one of the major starting points for this particular thesis.

In brief, each of the Canadian studies noted above emphasized the impact of Canadian law upon educational issues of rights, status, jurisdiction or capacity in matters of educational concern. This thesis, on the other hand, does not look to the rule of law in terms

of status, jurisdiction rights or capacity; but rather looks to the rule of law as it affects processes of educational administration. I have been unable to note published writing of research specific to the impact of Canadian law upon processes of educational administration.

In contrast, it is true that a great deal of American research has been devoted to the process of educational administration in the legal context of the United States. The extent of that writing is reflected by an observation of Hogan (1974:6) as he traces the impact of the United States law upon educational processes in the United States.

> It is estimated that approximately 40,000 court cases affecting the organization, administration and programs of schools were decided between 1789 and 1971.

Numerous writings of researchers emanate from those cases in the United States and in general, such research focuses upon the constitutional questions to which those give rise.

The unique character of the Canadian Constitution and its fundamental difference from that of the United States as noted above simply means that the validity of the American research must be restricted to the educational context of the United States.

All that can be added in terms of relevant literature review is to note the concept of Rule of law as it is viewed in Canadian legal context.

The McCruer Report (1958) directs itself to a jurisprudential study of that concept. At page 59, McCruer summarizes the meaning in general terms:

> It embraces the adoption in each legal system of safeguards appropriate to it to protect the rights of individual from unjust encroachment or infringement on basic rights by arbitrary action.

It is that broad understanding as to the meaning of "Rule of law" that is relevant to this thesis which proposes to concern itself with a Canadian legal perspective on selected administrative processes in education.

In summary this very brief review of the research literature emphasizes four points:

1. That there is a very limited amount of Canadian educational research as to impact of Canadian law on Canadian educational concerns.
2. That the topic of administrative process inherent to educational administration in Canada remains a topic demanding legal research.
3. That the conclusions of United States researchers are not applicable to Canadian administrative practices.
4. That there are recognized processes and tasks inherent to the discipline of educational administration as practiced by Canadian administrators.

Organization of the Thesis

The first chapter presents a development of the study including:

1. A statement of the problem.
2. The significance of the study.
3. A design for the study.
4. A definition of terms.
5. The delimitations.
6. The limitations.
7. The assumptions.

8. A review of relevant literature.

9. The organization of the thesis.

The second chapter describes the legal requirements of the Canadian law of libel and slander as it affects the selected communicative tasks of receiving, maintaining, orginating and transmitting of information which is defamatory in nature.

The third chapter applies the legal requirements of administrative law as they relate to the "decision-making" tasks of hearing, considering and deciding as performed by educational administrators in Canadian legal context.

The fourth chapter includes speculation as to the legal requirements related to the standards of performance required to be met in the task of providing educational programs.

The fifth chapter summarizes and provides cohesion to the topics of concern in this thesis. It concludes by noting areas requiring further study and research.

Chapter 2

ADMINISTRATIVE COMMUNICATION: LIBEL AND SLANDER

Educational administrators are required to communicate information concerning the abilities of others, the personal and moral qualities of others and the private and personal reputation of others. The tasks of maintaining the custody of records, receiving and recording information, and furthermore transmitting that information to other persons are tasks inherent to the communicative process.

The nature of some of the material maintained in the personnel files of teachers can be damaging to personal reputation. The material found in evaluative files can be damaging to professional reputation particularly if allegations of incompetence within those files cannot be substantiated.

In like manner the personal difficulties of students find their way in recorded form on to various student documents and files. Specific family difficulty is often-times recorded in detail on student cumulative records. The administrator in an educational setting is charged with receiving highly confidential and often-times damaging material from other agencies. These aspects of communicating are examples of the kinds of communications dealt with by such administrators as a part of their daily routine.

Such communications and administrative tasks related thereto are subject to rule of law in general, and to the law of defamation in particular. It is the purpose of this chapter to concern itself

with the development of the law of defamation and the current state of that law as it exists in Canada. Specifically, this chapter will apply that law to the communicative tasks performed by educational administrators.

In this chapter, I will make use of the concept of private wrong as a general legal framework in which to consider the tortious act of defamation in its two distinct forms of action: libel and slander. The essential ingredients of defamatory material will be isolated and the legal concept of publication will be clarified. The leading common law cases, as applied in Canadian law and as modified by Canadian Provincial statutes, will provide the primary source of information for this chapter.

The second portion of this chapter will examine the defence of justification, the truth of the alleged defamatory remark, as an answer to a charge of defamation. The present public-policy laws of privilege as they exist in Canadian law will be noted in considerable detail.

The remainder of the chapter will consider the specific impacts of such law upon educational aspects of the communications process. The legal position of the administrator who originates, receives, transmits, or maintains security of potentially defamatory materials will be noted and suggestions made to avoid legal culpability.

The Common Law and Tort

Tort law, loosely defined as the law of private wrongs, has derived its meaning from nearly every area of the English common law

as noted by Linden (1968:1).

> The common law of this country has been built up not by the writings of logicians or learned jurists, but by the summing up of judges of experience to juries consisting of plain men, not usually students of logic, not accustomed to subtle reasoning, but endowed, so far as experience goes, as a general rule, with great common sense, and, if an argument has to be put in terms in which only a schooled man could understand, then I am always very doubtful whether it can possibly be expressing the common law.

The lack of a cohesive principle in the English based common law becomes even more apparent when the relevant article of the Quebec Civil Code, Article 1053, is viewed in contrast:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill.

Chambers (1971:1), noting the different inherent nature of the common law and of the code of Quebec, comments that the approach of the code in clearly establishing culpability for wrong doing is antithetical to the approach of the common law:

> The basic question in our common law courts is not whether a person capable of discerning right from wrong is responsible for the damage caused by his fault to another but whether the plaintiff has on the facts established a cause of action, that is, has the plaintiff fitted his particular claim into one of the headings of wrongs for which the courts will compel the defendant to compensate him?

The common law being based on experience rather than principle has made the definition of tort law a difficult task. Linden (1968:14) quoting from C.A. Wright, the recognized "Dean" of Canadian tort lawyers, has written:

> While no definition of a tort has yet been made that affords any satisfactory assistance in the solution of the problems we shall encounter, the purpose, or function, of the law of torts can be stated fairly simply. Arising out of the various and

> ever increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property, which may in any one of a thousand ways affect the person or property of others, in short doing all the things that constitute modern living, there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another. The introduction of printing, by facilitating the manner in which a man's reputation might be injured by the dissemination of the printed word, had a tremendous effect on the law of defamation.

An earlier writer (Harper, 1954) described tort law as protecting various "interests". Within these interests was one identified as "interest in honour and reputation". It is within this interest of "honour and reputation" that the action of defamation lies. It is this same "interest" of "reputation" or of professional and private competency that concerns the educational administrator in his performance of evaluative tasks and communicative tasks related thereto.

Defamation

Within the nebulous field of tort law lies the even more intricate law of defamation. Chambers (1971:90) comments as follows:

> The field of defamation is undoubtedly the most intricate in modern tort law. Its labyrinths reek of mediaeval fine distinctions and logic gives way to history, but the subject is (an) iceberg, much more bulky and deadly beneath the surface.

That in the common law, a tort action for disparagement of name or reputation is well founded, is established by the comments of Cave J. Scott v Simpson (1882) 8 Q.B.D., 503.

> The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.

In brief there is a right in common law not to be defamed. The various Provinces have reinforced the common law rights by legislative enactment. These specific enactments will be noted at a later point in this chapter.

The educational administrator is in the position of receiving complaints from members of the public as well as from superiors and subordinates within his own organization. Inherent to complaints is material that tends to reduce one's estimation in the eyes of others. Clearly, this would be so in the hypothetical situation wherein an administrator had information to the effect that Miss 'X' is a drunkard and a gossip. She is hated by students and parents alike . Such comments, if assumed to lower estimation of Miss 'X', are in law, defamatory.

That people act with malice is a fact of life and further that exaggeration colors comment are factors impinging upon the truth of allegations. This being so, it seems obvious that the educational administrator at some time or other will receive, maintain or transmit material which on its face is clearly defamatory.

Forms of Common Law Defamation

Defamation of character can be communicated in one of the two tortious acts of libel or slander. Gately (1960:47) defines the two acts respectively in the following terms:

> Any permanent form of defamation may constitute a libel. It need not necessarily take the form of written or printed words.

In summary, the distinction seems to be in the degree of

permanency. The lack of logical legal principle distinguishing the act of slander from libel is commented upon by McArthur J. Meldrum v Australian Broadcasting Limited (1932) V.L.R. 245 Supreme Court of Victoria:

> The reasons for the distinction between libel and slander are historical and have no logical principle underlying them.

A ruling was therefore made that the defendant who had written a defamatory script seemingly an act of libel, and thereupon broadcast the same, an apparent slander, had in law committed a slanderous and not a libellous act.

The implications which flow from the distinction between slander and libel take on legal significance in the operation of Canadian law.

To say and to make known verbally that Miss "X" is a drunkard and a gossip and that she is hated by students and parents alike is to commit slander. This hypothetical example of a slander could by itself not support an action at common law unless Miss "X" could also prove actual monetary loss arising from the remarks. Loss of job would be one situation sufficient to establish pecuniary loss.

In contrast, to write and make known in more permanent form that same comment is to commit libel and libel is actionable at common law without proof of actual damage. No actual loss need be sustained. An action for slander without actual proof of pecuniary damage simply will not lie whereas an action for libel is complete without proof of such damage.

The extent to which this implication affects Canadian law will

be discussed later in this chapter.

The Legal Concept of Defamatory Material

That the material must be judged as defamatory is, of course, key to the existence of the tortious acts of libel or slander. What constitutes a defamation is a matter for consideration in each case. Chambers (1971:91) in reference to the leading case of Yousoupof v Metro Goldwyn Mayer Pictures Ltd. (1930) T.L.R. 581, C.A. notes the legal framework into which the defamation must fall.

> Discredit does not only include the old formula of hatred, ridicule or contempt but also any statement which would induce others to shun the defamed person.

The recent case of Murphy v LaMarsh (1971) 2 W.W.R. 196 establishes that the statement still represents the state of law as it is applied in Canada. The defendant, a lawyer and former cabinet minister, was forced to pay damages to a newspaper reporter to whom she had referred as "a person thoroughly detested by his colleagues".

The hypothetical case of the remarks pertaining to Miss "X" are clearly within the ambit of Murphy v LaMarsh case. Both comments were such as to induce others to shun the defamed person.

The Principles of Interpretation

Defamation is a matter of interpretation and Canadian courts have laid down some general principles as to how communications should be judiciously interpreted.

1. The courts must decide the question (of defamation) upon an interpretation which is reasonably plain and fair. Bulletin Co. V Sheppard (1917) 3 W.W.R. 279.

2. Defamation must rely on the plain and natural meaning of the words. Meier v Klotz (1928) 2 W.W.R. 84

> 3. Courts of Justice will not put a forced construction upon words. Ward v McIntyre (1920) 48 N.B.R. 235.
>
> 4. The court is not disposed to place reliance upon any precedents of action of slander in that age (the 16th Century) when it was fashionable to introduce into the consideration of them (actions of slander) such subtleties as the good sense of modern times has repudiated. Beardsley v Dibbles (1841) 3 N.B.R. 246.
>
> The common law is not so absurd as to permit anyone to lay hold of a single word in a statement. As it is common sense, so is it common law that the whole of the circumstances under which the word is used and the whole of the context must be considered. Ward v McBride (1911) L.R. 555 C.A.

Publication

To utter defamatory material is not in itself a tortious act. To utter such material and subsequently to publish it is a tortious act. Any libellous or slanderous defamation in order to be actionable at law must have been published. The remarks of Lord Esher M.R. in Pullman v Hill (1891) 1 Q.B. 257 defines the act of publishing:

> The making known of defamatory material, after it has been written: If the statement is sent straight to the person of whom it is written there is no publication of it.

Gately (1960:82) comments on the law as it applies to the act of slander:

> So in the case of a slander, the words must be uttered in the hearing of some third person. If they are uttered in the hearing of the person slandered only, there is no publication and therefore no action will lie.

To tell or write to Miss "X" under circumstances wherein only she will receive the admittedly defamatory material is not, in law, to commit an actionable wrong against her in terms of libel or slander. The reasoning of the law is that no harm has accrued to her since others are not aware of the defamation. The defamation has not been

published - or made known - to others.

In brief, no action will lie for actions of defamation in the absence of publication. In general, publication can be effected by any act on the part of the alleged defamer which conveys the defamatory meaning to a person other than the person alleged to have been defamed.

Gately (1960:83-89) illustrates examples of publication:

> 1. If, for example, a person reads a defamatory letter, knowing it is defamatory, to any person other than the person defamed there is a publication.
>
> 2. Again, if the writer of a defamatory letter, hands the letter to his clerk to be copied or typewritten before it is sent to the person defamed, and the clerk does copy or typewrite the letter, there is a publication of a libel to the clerk.
>
> 3. As a general rule, when a letter is addressed to a particular person, the writer is not responsible except for a publication to that person.
>
> If "A" addresses to "B" a letter defamatory of him and "B" shows or reads the letter to "C", the publication of the letter to "C" by "B" is his own act for which "A" will not be liable.
>
> But if in the circumstances of the case, the writer knows that the letter will be opened and read by some other person, other than the person to whom he addresses it, he will be liable for the publication to that person.

Unintentional Publication

At common law and in present Canadian law the defendant is liable for the unintentional publication of defamatory matter to a third person unless it can be shown that such publication was not due to any want of care on the part of the alleged defamer. Gately (1960: 89) notes:

> 1. Thus if "A" drops in the public street a defamatory

document and "B" picks it up and reads it, "A" will be liable for the publication to "B" for such was due to his want of care in the custody of the document.

2. Similarly "A" will be liable if he utters defamatory words in so loud a voice that "B" overhears what he says, whether he knows that "B" is within hearing or not unless he can show that he did not know and had no reason to suppose that any one was within hearing.

3. So, if the writer of a defamatory letter were to lock it up in his desk, and a thief were to break open the desk, take away the letter, and make its comments known, that would not be a publication for which the writer would be liable.

The Defence of Justification

The response to a charge of libel or slander that the slander or libel is in fact true is, in law, a complete answer. The onus, however, of establishing the truth is upon the person charged with making the defamation.

Such a defence, known as the defence of justification, is an onerous one to establish. Canadian law, following the English common law, has established a strict application for the defence. Clute J. Augustine Rotary Engine Company v Saturday Night Ltd. (1971) 38 O.L.R. 609 notes:

> To succeed upon the plea of justification the defendant must prove not only that the facts were truly stated but also that the innuendo is true. He must justify every injurious imputation.

Considered in terms of the case of Miss "X", as previously alluded to, the author of these remarks, upon their publication, can escape the legal consequences which flow from allegations of drunkenness, gossipy nature and poor relationships with parents and students only if all such statements can be strictly proved. The difficulties in so doing are obvious but they are difficulties the defamer must

overcome.

To conclude, truth is only a defence if it can be strictly proven. Such a task is often difficult and hence the defence is a limited one. The English case Belt v Lowes (1882) 51 L.J.Q.B. established the rigidity of the plea of justification by holding that the law presumes defamatory words to be false.

Occasions of Privilege

A defamatory statement having been duly published and not justified by the defence of justification can still be made without legal culpability, provided that the circumstances or occasions of its publication are privileged, as defined by law. In brief, this simply means that as a matter of public policy there are circumstances in which a person should not be held responsible for the consequences arising from publication of admittedly defamatory remarks. These occasions of privilege fall under two heads:

1. Absolute Privilege
2. Qualified Privilege

Absolute Privilege

In Canada the law is well known; Per Duff J. Waterbury v Dew (1876) 16 N.B.R. C.A.

> In all cases where the absolute immunity (privilege) from actions has been secured, it has been upon the ground that it was for the public interest that such an immunity should be given; and that for the public good a private mischief might have to be endured.

The case of O'Connor v Waldron (1935) 1 W.W.R., 76 established in Canada that such occasions of absolute privilege were restricted

to statements made in courts of justice or in tribunals which function as courts. The protection offered by absolute privilege simply does not arise in the daily activities of the educational administrator.

Qualified Privilege

Gately (1960:189) comments:

> There are occasions upon which on grounds of public policy, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue. On such occasions a man stating what he believes to be truth about another is protected, provided he makes the statement honestly and without improper motive.

A more recent writer (Carter-Ruck, 1972:137-150) notes that the occasions of qualified privilege are matters of law to be determined in each case. They generally fall into one of the following categories:

1. The duty to communicate
2. Statements made in the protection of an interest
3. Statements made in certain classes of reports

Of these categories the first two are of significance to the educational administrator. In all cases, however, it must be noted that malice or excess of publication will not be protected by a plea of privilege.

A Duty to Communicate: Qualified Privilege

It is not sufficient that the duty to communicate be only in the person who communicates, for there must also be a reciprocal duty to receive on the part of the person who receives such information. The question as to whether or not such corresponding duties do exist

is a matter of judgement in each case.

To apply this rule to the hypothetical situation of Miss "X", it may well be that the defamer who has published such material which is incapable of proof, may seek the legal protection of privilege by establishing:

1. There was a duty to make the material known.
2. There was a reciprocal duty on the part of the person to whom it was published to receive that information.

Most administrative reports will fall within this ambit. Reports by principals to superintendents, and the usual inter-office reports will normally be protected by privilege. The danger lies in an excessive publication. To make such statements about Miss "X" at a public meeting might well be excessive and hence not privileged. To distribute copies of a complaint to those unauthorized to receive them will destroy privilege. To discuss the allegations about Miss "X" in the presence of others may well be an excess of publication and Miss "X" will be able to establish that privilege was destroyed.

The duty to communicate or receive information need not only be a legal one (in the sense that it is imposed by statute) but it may well be one that is deemed to exist as a moral or social duty. That this is the present state of Canadian law is noted in the case of <u>Arnott v College of Physicians and Surgeons of Saskatchewan</u> (1954) S.C.R. 538.

> A privileged occasion (qualified) is an occasion where the person who makes a communication has an interest or legal duty, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest to receive it.

It is not the purpose of this chapter to examine the myriad of cases which are reported concerning the existence of such duties. The general concept is in my opinion best presented by the question raised by Lindley J. in Stuart v Bell (1891) 2 Q.B. 344, 350.

> Would the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?

Carter-Ruck (1972:138) puts it more simply:

> Was it reasonable that the defendant published the statement complained of?

Information may be given in reply to a query and receive the benefit of the defence of qualified privilege.

To consider this in relation to the defamation of Miss "X" is to suggest that the defence of privilege for the defamer is more viable if the material in question was published in response to a valid inquiry. In contrast, the volunteering of defamatory material in terms of law suggests malice, and is evidence of malice. Malice destroys privilege of law.

The implications for educational administrators are obvious. The proper time to provide information is in response to legitimate inquiry. To receive volunteered information demands administrative sensitivity to the existence of malice.

The existence of a moral duty to communicate or receive communication finds its basis according to Carter-Ruck (1972:139) on the existence of confidential relationship existing between the parties. This suggests that statements made in the course of confidential relationships existing between administrators and students or

administrators and parents would thus be protected.

An interesting Canadian case Matheson v Brown, (1915) 49 N.S.R. 198, established that statements made by a shop manager to the plaintiff's mother concerning an alleged theft were protected as an occasion of privilege.

The shop keeper reported to the complainant's mother that the daughter (complainant), a young girl, had committed theft within the store. The daughter sued the shop keeper for defamation on the basis of his statement to the mother. The theft, being incapable of proof, left the store keeper in the uncomfortable position of having defamed and published what in law amounted to an untruthful statement. The shop keeper claimed the occasion of publication was privileged on a basis of a moral duty to inform the mother. This plea was accepted by the court.

A logical application of this case to the field of education suggests that a similar moral duty on the part of educators to discuss students' behaviour with parents would be recognized. This being so, such communications between parents and educators would accordingly be privileged.

It is important to note that although the handing of a letter to a typist for copying is a publication as noted previously in this chapter, the occasion of such publication is deemed in law to be one of qualified privilege provided it is done in the normal course of business.

A further comment of Carter-Ruck (1972:140) is significant at this point:

> There may, however, be occasions when it is necessary to make an imputation of such a serious character that it would be improper to use ordinary methods and in such a case publication to a secretary or a typist would not be protected.

Statements Made in the Protection of an Interest

Statements made in the protection of interests fall under three heads:

1. Private Interests
2. Public Interests
3. Common Interests

In general, a person whose reputation has been attacked is privileged in addressing his defence. If Miss "X" in reply to the defamation made by "Y" should reply to the effect the "Y" is a liar and incompetent to judge, then Miss "X" can claim privilege for her defamatory remarks against "Y". She was simply protecting a private interest, her reputation.

A recent case of interest to this chapter is that of Mallet v Clarke (1968) 70 D.L.R. 67. The plaintiff, a former student, had attended a Vocational school in British Columbia for the purpose of learning hairdressing and subsequently had been expelled. The student complained to a local newspaper about the alleged injustice of this expulsion. The newspaper, on phoning the principal, had been informed by him that the student, Mallet, had been "terminated permanently for conduct detrimental to his class and his customers.... and that he lacked the tact and adaptability for his chosen profession".

The student claimed he had been slandered. The words were held to be defamatory and published. The principal was held not to be

liable for the alleged slander since the remarks were made in reply to a charge of acting without justice to the student, Mallet. The administrator was simply defending a private interest, his own reputation, and thus the remarks so made were published under the protection of privilege.

Defamatory material published in protecting a public interest is considered published under circumstances of qualified privilege. This situation generally takes the form of complaint to a public official as to the improper conduct of a person in the exercise of public duty. In order to qualify for this protection, Carter-Ruck (1972:144) notes that the underlying motive of the complainant must be either for an investigation of the wrong or a redress of a wrong. A mere desire for invective does not allow the operation of privilege as a defence. Educational administrators who deal with complaints from the public will face this situation a number of times. The relevant law in Canada is established by the case of <u>McIntyre v McBean</u> (1856) 13 U.C.Q.B. 534. This case notes that a statement made by a body of citizens living in a school district as to the "intemperant and immoral" behaviour of the local teacher was deemed made under conditions of privilege such statement being in furtherance of a public interest.

Statements made in support of a common interest are, in the absence of malice, considered made under circumstance of qualified privilege. The most obvious example of a common interest as far as education is concerned is that which exists by common membership in

a professional association. A complaint about Miss "X" to the teacher's association by a fellow member of that association could well be construed as being privileged in the sense that it related to a common interest, that common interest being the welfare of the teaching profession. This branch of the law is replete with technicality and hence will not be further elaborated.

The administrative implication arising from these situations will be a matter of concern towards the end of this chapter. At this point it suffices to conclude that the law of defamation does not prevent communication but rather facilitates it under legally defined conditions.

The Law of Defamation in Canadian Context

The British North America Act 1867 provides the constitutional framework for the law of libel and slander. The Constitution assigns differential legislative powers to central and provincial jurisdictions and in so doing has quite clearly placed the matter of civil defamation within the legislative competence of the various provinces.

The laws of Canada and the common law provinces (which excludes Quebec) are based upon the common law of England and hence those aspects of the English common law which relate to the legal meaning of defamation as a tortious act, the distinctions between libel and slander, the necessity and essence of publication, the answer of a defence of justification, and a plea of privilege (absolute or qualified) are matters of Canadian law.

The legal picture becomes fuzzy simply because statute law

overrides common law and hence the common law presented earlier in this chapter has been changed to the extent that provincial statute law has introduced modification.

Additional complications arise as each province has elected to change the basic common law in ways unique to its own needs. This means that there is no single law of libel and slander, although each province save Quebec shares a common base of common law.

The laws of Quebec are not within the scope of this study, but as a matter of interest the comments of Carter-Ruck (1972:288) clarify the Quebec legal picture.

> There has been considerable discussion in Quebec as to whether the law of defamation of the province is based on French law or on English common law. It now seems finally decided that articles 1053 and 1054 of the Quebec Civil Code apply to action for defamation and not the English common law.

In terms of the early common law which applied, prior to provincial enactments modifying that law, the distinction between libel and slander took on legal significance. The common law act of slander was simply not complete without proof of actual pecuniary loss. On the other hand common law action for libel was considered as complete, in terms of law, upon proof of publication of defamatory material.

Some slanders in the common law were considered complete even though actual pecuniary damage could not be proved. In a sense these were really slanders of a particularly heinous nature. The types of slanders immune from necessity of proving damage can be classed under four heads. Canadian law, as expressed by the provinces, still

excepts these four specific slanders from the general rule that damages must be proven.

1. Imputations of the commission of a criminal offence.
2. Imputations of having certain contagious diseases.
3. Imputations of unchastity against a woman.
4. Imputations calculated to disparage a person in any office, profession, calling, trade of business held or carried on by him at the time of publication.

The effects of provincial law hereinafter summarized have been twofold:

1. To establish a statutory basis for actions of defamation.
2. To eliminate, in some cases, the common law distinction between libel and slander.

Provincial Statutes Concerning Defamation

The summaries below relate only to major substantive changes brought about in the common law of defamation by virtue of statutory enactment. The many procedural changes are not considered. Carter-Ruck (1972:272-291) provides a summary.

1. Alberta

The Defamation Act (C37) R.S.A. 1970 provides in section 3:

> An action lies for defamation and in an action for defamatiom where defamation is proved damage shall be presumed.

This simply means that the common law distinction between libel and slander is eliminated and that damage arising for commission of the act in either form need not be proved. In brief, Miss "X" need not prove damage arising from the remarks stated verbally about her to others. Slander, like libel, is actionable per se.

2. British Columbia

The Libel and Slander Act R.S.B. C 1960 does little to change the English common law. The distinction between libel and slander remains as a matter of law.

3. Manitoba

The Defamation Act 1970 R.S.M. C. 20 is very similar to that of Alberta and hence the distinction between libel and slander is eliminated and damages are presumed.

Section 19 of the act is unique in English law in that:

Publication of a libel against a race or religious creed likely to expose persons belonging to the race or professing the religious creed to hatred, contempt or ridicule and tending to raise unrest or disorder among the people entitles a person belonging to the race or professing the religious creed to sue for an injunction, to prevent publication or circulation of the libel.

4. New Brunswick

The relevant statutory provisions are contained in the Defamation Act R.S.N.B. 1952 C.58. The distinction between libel and slander is eliminated.

5. Newfoundland

The relevant statutes occur in an act entitled An Act Respecting Slander R.S.N. 1952 C. 133. Very little substantive change is made to the English common law.

6. Nova Scotia

The relevant statute known as The Defamation Act R.S.M. 1967 C. 98 does little to amend the English common law. The distinctions between libel and slander are maintained.

7. Ontario

The relevant statute entitled The Libel and Slander Act R.S.O. 1960 C. 211 maintains the distinction between libel and slander.

8. Prince Edward Island

The relevant statute entitled The Defamation Act R.S.P.E.I. C. 41 eliminated the distinction between libel and slander. Damages

are also presumed.

9. Saskatchewan

The relevant legislation is similar to that of Ontario, and is entitled The Libel and Slander Act R.S.S. 1965 C. 10.

Administrative Implications

Inherent to the communicative process are certain distinct administrative tasks. Selected for the purpose of this study are those:

1. That concern the custody and maintenance of material which has the legal potentiality of being defamatory.
2. That concerns the receipt or receiving of material that is potentially defamatory.
3. That concerns the transmission of material which is potentially defamatory.

Custody of Potentially Defamatory Material

The custodian of information as kept in form of written files cannot be in a position to have personal knowledge of all of the content of such files. Some categories of files quite clearly possess a greater capacity than others to contain potentially defamatory material. Personal files are particularly susceptible.

Likewise the personal files of students containing a great deal of personal information possess a high capacity to contain defamatory material. A file containing information to the effect that a child's father is subject to a drinking problem, if untrue or incapable of proof, is clearly defamatory, not to the child but to the parent.

It is not an offence to possess defamatory material. To have possession of the comments as they relate to Miss "X" filed away in some manner is permissible. The problems arise when others acquire access to that information. The case of Edgeworth v New York Central (1936) 2 D.L.R. 577 is significant to this point.

The plaintiff, a former train employee of the company, had been dismissed. The letter of dismissal alleged he had committed an act of sexual intercourse with a passenger and this was the apparent ground of dismissal. A copy of the letter was filed in the company's files. Several employees of the company had access to those files and hence the allegation, clearly defamatory, became published. The circumstances of the publication were not construed by the court as occurring under an occasion of privilege and hence the defendant was liable for libel.

This case establishes that poor filing practices resulting in publication of defamatory material destroys the defence of privilege. The privilege is destroyed even though the person to whom the material is published is employed by the defendant organization. This case, applied to that of the hypothetical and much maligned Miss "X", points to the fact that those libellous remarks concerning her must be securely filed and that access to that file be restricted. To do otherwise is to destroy the privilege which would normally accrue. The danger of maintaining custody of files containing defamatory material relates to the danger of publication.

The problem of maintaining copies presents a similar potential hazard and hence material potentially defamatory should not be copied

unless absolutely necessary. The distribution of copies must be restricted. The secure filing of copies is essential.

That defamatory material should be kept at all is open to question, and hence it may be wise to remove such material, see to its destruction and thereby prevent publication at a later date.

The modern use of computers to "store" information poses unique problems to the person charged with the responsibility of custody. The question immediately arises as to the degree of access others have to stored information. If others retrieve information under occasions where privilege cannot be established, then publication completes the act of libel and liability may exist.

This means that the task of custody must mean more than merely keeping. The task responsibility must extend to limiting access to material or insuring that any publication occurs under privileged circumstance.

The administrative tasks of custody must therefore establish security of files as a priority. Other task aspects must insure that publication is available only to those having a valid legal interest to see the information. Perhaps the most important task of all is to see to the destruction of defamatory material at the earliest possible time to prevent future publication.

The Receipt of Information

On the surface, the administrative task of receiving information poses no legal problems. The act of receiving or overhearing a defamatory remark is not a tortious act. It matters not whether

the source of the defamation is outside or inside the formal educational organization simply because the legal implications in each situation are similar.

In each case, the receipt of defamatory material completes the act of libel or slander. The administrator who receives information from others has had remarks published to him. No legal liability lies against one who becomes aware of defamatory material. The act of publication renders the originator legally responsible for the defamation. It follows that the originator can only escape that liability if the defamation can be justified or if the occasion of publication can be privileged.

The responsible administrator must be aware of the originator's legal position. There is little that he can do in terms of justification, for that is within the capacity of the person reporting. There is much he can do to assure that privilege will protect the publication.

Quite clearly the administrator must know and appreciate his own role within the educational organization. Is it his duty to listen to the complaint? What are the formal channels of communication? These are the specific questions facing him. To perform a function that is not formally his is to deprive the communicator of privilege; for privilege only exists in publication situations wherein the communicator has a duty to report and the receiver has a reciprocal duty to receive. This simply means that the administrator whose role it is to receive has the duty to receive. The

administrator who does not have such a role cannot fulfil that component of reciprocal duty essential to privilege, and hence places the originator on dangerous legal ground. Clearly it is the duty of this administrator to direct the originator to the proper receiver, and this he can only do by having a thorough knowledge of the channels of communication.

Privilege can be destroyed by malice or excessive publication on the part of the originator. There is little that an administrator can do with malice other than to be sensitive to it. On the other hand the responsible administrator can help to assure that the remarks are made in privacy, and in the absence of others. To allow excessive publication is to place the originator in a tenuous position.

This means the person who receives information should assure himself that he has legal capacity to do so; furthermore he should control the transmittal of such material to the extent he is able in order to assure privilege of publication and prevent excess of publication. The administrator who receives the derogatory information about Miss "X" must be aware that such information is legally defamatory. He must not compound the situation by allowing its publication in his presence unless he has the duty to listen to complaints of this category. If it is his duty to receive, he should, as far as he is able, protect the originator in terms of privilege.

The legal attitude towards defamatory material is clearly that such defamatory material is presumed false. It follows that the administrator who receives defamatory information should adopt a similar mental stance and hence it becomes incumbent upon him to

require some degree of justification from the originator. In concrete terms it must surely be that the responsible administrator will demand more than mere rumor to substantiate the defamations made against Miss "X".

Transmittal of Information

The duty to receive information oftentimes implies a subsequent duty to transmit such information to others. If that information should be defamatory in nature then the transmitter becomes in legal terms both the defamer and publisher. Clearly the transmitter must rely on privilege and justification to vindicate his actions. In many administrative situations, such as that of the voicing of allegations made against Miss "X", justification may simply not exist. Hence it is to the question of privilege that educational administrator should direct their attention.

Privilege exists when concurrent and reciprocal duties to transmit and receive exist. The limits of duty to transmit are defined by two cases.

The first of these cases, Prentice v Hamilton (1831) Draper 938, provides an example wherein privilege was deemed not to exist. The duty of the originator, who is the defendant, is at issue.

The defendant told his employer that the plaintiff, a fellow employee, had stolen money from the employer's business. The liability of the defendant depended upon the question of privilege since the information was clearly defamatory and incapable of proof (unjustifiable). Privilege was held not to exist since the report

made by the plaintiff was not within the ambit of his usual duties as prescribed by the company policy. There being no duty to transmit, there was not privilege and hence the plaintiff was legally culpable.

In contrast, the case of Hulmer Marshall J.P. 136 established the existence of privilege on the basis of duty to report. The plaintiff teacher sued the defendant, a vice principal, on the basis of a report made by the defendant to the principal reporting durnkeness on the part of the plaintiff. The fact of drunkeness being incapable of strict proof meant that the case hinged on the question of privilege. Was there a duty to report?

The duty to report was recognized by the court since such reports were clearly within the usual duties of a vice-principal.

These two cases simply establish that the duty to report and hence the protection of privilege is dependent upon the formal role of the person reporting. The implication of significance to the administrator is that he be well aware of his role. If it be his role to report he must be aware of the formal channels of communication so that a report is made to one entitled to receive. Within such circumstances no legal danger exists.

In conclusion: privilege must be real, it cannot be manufactured. Carter-Ruck (1972:140) notes:

> Nor will a statement, which is published on an occasion which is not in law privileged, become protected by having some word, such as confidential, private, or personal put upon it.

This simply means that administrators should be aware of the

law as it relates to defamation, and that mere technicality of labelling files as confidential or otherwise is not sufficient to assuage legal responsibility.

Chapter 3

ADMINISTRATIVE DECISIONS:

ADMINISTRATIVE LAW

The professional role of the educational administrator demands the exercise of the power to decide. Modern writers have noted the importance of the process of decision making as an administrative process. Owens (1970:90) notes:

> Contemporary thinking about the nature of administration both within and out of education places decision making in a central position.

Sergiovanni and Carver (1974:231) place decision making at the center of educational activity; whilst Simon (1960:1) sees the process as key to the entire administrative process.

In practice, the educational administrator is charged with making decisions which in many instances affect the rights of others.

The right of a student to remain within a school setting; the right of a student to select an educational program; and the right of students to interact generally may all be impinged upon by the exercise of decision-making power by educational administrators.

The rights of teachers to exercise their professional skills in the school setting, their rights of tenure, promotion and designation, are often times impinged upon by decisions made by

administrators in performance of their daily tasks.

The administrator in an educational setting must face up to the fact that conflict will be a practical fact of life. The task of deciding how to meet the interests of the individual members of the educational system and at the same time satisfy the demands of the goals of the organization defines the challenge implicit to the exercise of decision-making powers. The challenge becomes even greater when one considers the role of parents, taxpayers, and politicians as they apply pressures from within and outside the organization.

A decision not to decide can equally affect rights and can, in the legal sense, be as important as decisions which are positive. In brief, the educational administrator cannot escape the consequences of his decision. The fluidity of the context within which these decisions must be made has been defined by March (1974:24) as an "educational anarchy".

The rule of law in general and administrative law in particular attempts to bring some order into this apparent state of anarchy and hence this chapter will examine the nature of the power to decide the constraints upon its exercise, and will suggest guidelines for administrative decision-making processes designed to achieve justice. A study of selected court cases will be utilized to apply legal principles to matters of educational concern.

THE POWER TO DECIDE: A LEGAL PERSPECTIVE

Laux (1973:1) comments on the legal nature of the administrative process and the function of administrative law:

> More specifically, the administrative law is that part of our whole body of law which concerns the transfer of power from legislatures to subordinate agencies, exercises of that power by the agencies and review of the exercise of that power by the courts.... The complex of methods by which these agencies carry out their tasks of rule making, adjudication and related functions may properly be termed the administrative process.

A legal concept of the power to make decisions is crucial to understanding the scope, nature and function of the constraints impinging on that power by the application of the legal principles of administrative law.

This chapter will emphasize both the (1) substantive nature of the decision-making power as well as (2) the process involved in its exercise as it is performed by the educational administrator.

Administrative and Judicial Powers To Decide

The definition of "administrative power" as noted by McCruer (1968:28) signifies:

> A power is administrative if in the making of the decision, the paramount considerations are matters of policy.

The report distinguishes "administrative" power from "judicial" power, although the author points out that such distinctions cannot be construed as being mutually exclusive. McCruer notes (1968:28)

> A power is primarily judicial where the decision is to be arrived at in accordance with governing rules of law... In using these terms with these meanings, it must be emphasized that no clear cut and mutually exclusive distinction exists between the administrative and judicial powers.

It is submitted that the educational administrator is primarily concerned with decisions wherein policy considerations are paramount and hence exercises an administrative power. This thesis does not discuss judicial decision making power. Rather this chapter section concerns itself with administrative power and specifically with the two ways of exercising such power, namely: the purely administrative (discretionary) and the quasi-judicial.

Purely Administrative v Quasi-Judicial Power

The administrative power to make decisions is, in Canadian administrative law, construed in terms of process. The manner in which that process of decision making power is exercised is subject to the supervision of the courts as determined by law.

It follows that an understanding, in the legal sense, as to how that decision making power is exercised is crucial to responsible administration. McCruer (1968:29) notes a definition in terms of process of the two modes of exercising that power.

> In legal parlance it is said in some cases administrative powers must be exercised by acting judicially. That is, the decision although it is administrative because it is arrived at on grounds of policy, is to be made after compliance with minimum standards of fair procedure...In these cases the administrative power is termed'quasi-judicial'...In other cases, no obligation to act judicially - no requirement to follow any minimum standards of fair procedure - is imposed on the exercise of administrative power. In such cases the power is termed; 'Purely Administrative'.

This simply means that the educational administrator,

in exercising a power to decide, exercises a power which in legal terminology is administrative in function but may well be "Quasi-judicial" or "Purely Administrative" in terms of process.

A hypothetical example may clarify the issue. A Superintendent may decide on the basis of policy not to hire married female teachers. The exercise of that power is an administrative power and there is no requirement for that decision to be made in a "judicious" manner. The decision is one of discretion.

To fire present staff on the basis of such a policy is still an administrative decision since the paramount concern is policy but in that case, existing rights are affected. This thesis will later show that when existing rights are at issue, then administrative decision-making powers should be exercised in a "quasi-judicial" manner, a manner which demands fair procedure.

Status of The Educational Administrator

The power to make decisions can be vested in individuals but more often it is vested in governmental agencies, local boards or tribunals. McCurdy (1968:14) comments:

> The legal framework...is a body of legislation which has been built up in each province over the years. The acts comprising this body may be called Department of Education Acts, Education Acts, Public School Acts, Teaching Profession Acts and a broad miscellany of related legislation. While a wide variety exists regarding the name given to these acts in the several provinces, in substance the pattern of functions is fairly constant.

McCurdy (1968:15) comments that on examination these acts reveal that:

> Legislatures have established two agencies whose function is to administer policy respecting education. One, the Department of Education is responsible for administering general province-wide policy; the other, the local authority, for administering policy in the local area.

In general, the power to decide is legally devolved upon agencies, boards or other duly constituted tribunals. It follows that the exercise of power to decide, as it is exercised by individual administrators in the course of their employment, as employees or officers, is construed in law as an exercise of that power by the subordinate board or agency. The educational administrator who fails to comply with processes as demanded by law places his board in a position of legal jeopardy.

Clearly, educational administrators who decide on behalf of the educational agency they represent must be sensitive to the legal requirements of that process. They must be equally sensitive to the fact that court supervision of their behaviour may well be requested by one who challenges their decision. This sensitivity can be achieved by a study of the means, methods and consequences of court reactions to the administrative exercise of decision-making powers. These reactions in the form of judicial decisions provide the legal guidelines for the lawful exercise of the power to decide.

Educational administrators are not exempt from court action. Those who would challenge decisions of educational administrators do have an access to the courts. Subsequent supervision by the court can prevent implementation of decisions, quash the decision, or prohibit the decision making process from operating. In cases of neglect,

the court can command the administrator to make a decision.

The educational administrator who decides matters related to provision of educational services often does so within a context of controversy. He must always recognize that controversy breeds challenge.

Judicial Review

The means whereby Canadian law imposes the supervisory aspects of administrative law lies within the constitutional concept of "Judicial Review". Laux (1973:18) notes:

> In order to ensure that powers conferred by the Legislature are not exceeded and that they are properly exercised, virtually every legal system provides that there be some method for the enforcement, restraint or review of the exercise or purported exercise of subordinate legislative, judicial or administrative power. The basic principle in our constitution has been that "Judicial Review" is a function of the superior common law courts.
>
> There is an historic supervisory jurisdiction of ancient origin exercised through the Prerogative Writs of Mandamus, Prohibition, Certiorari, Quo Warranto and Habeas Corpus. To these have been added in modern time actions for Declaratory Judgements and Injunctions.

Chefins R.I. (1969:127) comments:

> The courts have been more aggressive in the area of administrative law than they have been in other respects. The term "Administrative Law" is used here to describe the control the courts exercise over actions of administrative officials. First the court will prevent government officials from going beyond the ambit allowed to them by law. This is known as the doctrine of Ultra-Vires, which simply means that a governmental official or body must act within the limit of the power allowed by statute. In addition however, the courts have evolved a doctrine that if a governmental official or body is exercising a judicial or quasi-judicial function, he must act in accordance with

principles of natural justice; otherwise the decision will be quashed.

The prerogative writs of Certiorari and Prohibition are the legal remedies which command a decision to be quashed.

The Scope of Judicial Review

The scope of Judicial Review is limited. Each of the remedies noted below are limited in their application. The vehicles of Judicial Review can be classified under five heads.

1. The right of statutory appeal.
2. The Prerogative Writs.
    - (a) Prohibition.
    - (b) Certiorari.
    - (c) Mandamus.
    - (d) Habeas Corpus.
    - (e) Quo Warranto.
3. The Common Law Remedies.
    - (a) Actions in tort or contract.
    - (b) Criminal Proceedings.
4. The Equitable Remedies.
    - (a) Injunction.
    - (b) Declaratory Judgement.
5. Statutory Review.

The remedies offered by way of Habeas Corpus, Quo Warranto, Statuatory Review and Criminal Process are excluded from consideration in this chapter. They do represent other means of achieving

legal redress but their applicability to educational matters is very limited.

Redress by Right of Appeal

The view that administrative decisions can as a matter of right be appealed to the courts is erroneous. There is no natural, absolute, or unwritten rule of law granting a right of appeal to the court in Canadian law. Specifically, the legal position in Canada is that the right to appeal to the courts does not exist, unless and only unless, that right is specifically granted by the terms of the statute which is the subject of appeal.

For educational administrators, this means that unless the School Act of Alberta specifically states within its terms that a right to appeal to the court exists, then in absence of such specific permission no such right to appeal to the court exists in law. The Alberta Act contains no such provision. Review of the relevant enactments of the other common law provinces indicated in similar vein that no such rights of appeal to the courts are specified.

The fundamental principle respecting appeals is clearly stated by Middleton, J.A. in Re Guardian Realty Co. of Canada and Toronto (1934) O.R. 266, 270:

> An appeal is a creature of statute and there is no right of appeal unless expressly given.

A case of educational interest, namely the Timmins Public School Board v Hollinger Consolidated Gold Mines Limited (1962) 397 is specific to the question of appeals to the court in educational

matters. The point in issue, namely the right of the board to assess tax against the Hollinger Mines, is not germane to this thesis. The comment of Porter C.J.O. as it relates to the interpretation of statutory rights of appeal is, however, significant. He stated:

> Statutory provisions giving rights to appeal are generally construed strictly.

The right of appeal is statutory. If it is not expressly provided for, such right does not exist. A review of the major pieces of educational legislation indicates that appeal to the courts is not generally provided and hence for this reason the right of appeal as it impinges as a constraint of decision-making power will not be thoroughly considered.

Where such rights of appeal are granted the three concerns questioned by the courts are:

1. Did the administrator exceed his jurisdiction?
2. Did the administrator err in applying the law?
3. Did the administrator err in the finding of fact?

To infer that no rights of any kind exist as to appeal within various provincial acts is erroneous. Most provincial enactments do allow some rights to appeal to the provincial Minister of Education. This is an entirely different right, and cannot be perceived in the same light as a right to appeal to the courts. Court appeals are traditionally presumed to be free of political consideration in rendering their decisions.

A specific example of the right to appeal to a minister lies within sec. 79 (3) of the Alberta School Act:

> A teacher who is suspended by a board may appeal to the Minister within 14 days after receiving the notice of suspension.

This section does not imply a right of appeal to the court, but it does allow an appeal to the Minister.

Redress by Way of Prerogative Writ

Clearly many decisions based on policy are "purely administrative" in terms of their legal nature. Such purely administrative decisions are exempt from the prerogative writs of certiorari and prohibition, although subject to the consequences of the writ of mandamus. It should be further noted that "purely administrative" decisions are subject to other constraints of judicial review later defined in this chapter.

This simply means that educational administrators have legal obligations to fulfill in exercise of the power to decide. Redress by way of prerogative writ is but one of the legal avenues open to those who would challenge the educational administrator in a court of law.

The legal remedies made available by way of prerogative writ offer wide opportunity to challenge legally the process of administrative decision making. These wide opportunities are in marked contrast to the strictly limited rights of appeal to the courts as previously noted.

In general, the remedies provided by way of prerogative writ take the form of supervisory reactions taken by courts upon the occasion of a decision illegally made. In particular the court

responds by providing remedies in three different and distinct ways.

1. The remedy offered by the legal action of seeking issuance of the prerogative Writ of Certiorari is to set aside or quash the entire process of decision making.

2. The remedy offered by the legal action of seeking issuance of the prerogative Writ of Prohibition is simply to prohibit further progress of the process of decision making.

3. The remedy offered by the legal technique of seeking the issuance of a Writ of Mandamus is to have the court compel the process of making a decision. In other words, when procrastination by administrators is deemed to be illegal, the courts will command that a decision be made.

In brief, the supervisory practices of the court, that is, the redress available by way of prerogative writ, will be imposed upon the occasion of illegal exercise of quasi-judicial decision making power, and the court, in its prerogative can quash, set aside, prohibit or compel.

The lawful authority for courts to supervise the decision-making process of administrators is two-fold. Primarily legislative authority to do so arises from section 129 of the B.N.A. Act which vests in the provinces the power to issue prerogative writs through their Superior Courts. Secondly, the Canadian case of <u>Board v Board</u> (1919) 48 D.L.R. 13, clearly establishes the provinces as having residual powers to issue such writs. The reasoning is simply that in law, Canada is deemed to have adopted the English common law as it existed prior to July 15, 1870. It is a matter of

legal history that the English courts had the prerogative of issuing writs to constrain the unlawful exercise of decision making prior to that date.

As a matter of procedural law, the writs are not required to be issued formally to be effective as a remedy. Each province has devised procedural rules whereby the court can make an order in lieu of issuance.

Legal Limits of Redress. The restraints imposed by way of Certiorari and Prohibition do not apply to all the decisions which will be made by educational administrators. Indeed, these constraints are limited only to those decisions made by a process which is deemed in law to be "quasi-judicial". The "purely administrative power" to decide is not subject to the supervision of the court by way of Certiorari or Prohibition proceedings.

The Canadian case, Re Ashby (1934) O.R. 21, notes that a "purely administrative process" amounts to a "complete, absolute and unfettered discretion". In contrast, a "quasi-judicial" function looks to some law to guide it.

MacKinnon (1961:24) identifies the circumstances which in Canadian law gives rise to the legal necessity to act in a quasi-judicial manner. He refers to the case of Security Export v Hetherinton (1923) S.C.R. 539 as authority for the proposition that when decisions impose liability on others or affect the rights of others, there is the legal requirement to act in a quasi-judicial manner. It follows that to fail to act in such a manner, when it is

required, is to exercise illegally the decision making process.

This simply means, for purpose of illustration, that educational administrators who expel students or decide upon an imposition of fees must decide these issues in a quasi-judicial manner. In other words, they must look to some law to govern the exercise of the power to decide. Such law, is described as The Law of Natural Justice.

The proposition that one must act in a quasi-judicial manner when rights are affected,as noted by MacKinnon (1961), has in the experience of Canadian law proved difficult to apply. Seemingly, each case is decided upon its own particular set of circumstances. This has led to a subsequent judicial comment by Pennell J. in Voyager Exploration Limited v Ontario Securities Commission (1970) O.R. 237 wherein he stated:

> The test to distinguish between a purely administrative and quasi-judicial act is almost as elusive as the Scarlet Pimpernel.

The practical difficulties faced by administrators to categorize the decision making process as "quasi-judicial" or "purely administrative" are highlighted by two apparently conflicting cases.

The first of these, Regina v Board of Trustees of the Estevan Collegiate Institute, ex Parte Dirks (1970) 16 D.L.R. 570, concerns the legality of the decision making process of the board which resulted in a notice being sent to Dirks advising him that his contract would be terminated.

The notice indicated his services were being terminated "because of the need to reduce staff". There was not any questioning

of his professional competence. Dirks argued that the decision making process of the board was illegal since there was not adherence to the rules of natural justice and that such adherence was a legal requirement since his rights were affected by the decision. The board acknowledged that it had not followed the rules of natural justice but it argued that it was not required to do so.

The Saskatchewan Court of appeal ruled:

> Clearly the board bases its decision, not on legal rights and liabilities, but what it determines to be policy and expediency. Therefore...the exercise of that power is administrative.

The implications which follow from the Dirks case have significance for educational administrators.

1. The court will determine to its own satisfaction the essence of the matter decided upon. In Dirk's case the court concluded that in essence the matter for decision was primarily a policy matter. That Dirk's rights were affected was incidental. In essence the board was deciding upon the need to reduce staff. It was not deciding the issue of Dirk's right to teach.

2. The administrator or administrative body that exercises the power to decide must be able to evidence to the court that the choice of decision making process was legally appropriate. The Dirk's case does not suggest that matters requiring the exercise of quasi-judicial powers can be hidden or disguised as matters of policy requiring only the exercise of purely administrative powers. In the Dirk's case the board could establish clearly the policy nature or the issue in question.

The second case: Re Cardinal and Board of Commissioners of Police of the City of Cornwall (1973) 42 D.L.R. 323 concerns itself with the same issue of contention as in the Estevan v Dirks case. Cardinal, a policeman employed by the City of Cornwall had his contract of employment with the city terminated, as the city argued that it was a matter of policy that physically disabled policemen would not be retained on staff. Although on the surface this case does not appear to reflect a concern of education, the comments within it are directly applied from the English case of Mallach v Aberdeen (1971) 1 W.L.R. 578. Mallach was a teacher who was fired because of alleged incompetence. The decision making process which resulted in Mallach's termination was set aside by way of certiorari because such process was illegally exercised.

In like manner, the power to decide was deemed illegally exercised in the termination of Cardinal. The court ruled that in essence, as in the Mallach case, the matter of decision affected rights.

In like manner, the process of decision making resulting in Cardinal's termination was set aside by the court. The Ontario court ruled that the matter of decision, as in the Mallach case, was a matter affecting rights and hence a matter to be decided in a quasi-judicial manner, i.e. in a manner complying with the rules of natural justice.

These cases can guide educational administrators to the realization that courts will not permit administrative manipulations

to clothe matters affecting rights in a cloak of policy. Clearly the administrator who attempts to do so will be committing a "cardinal" sin against the fundamental rules of administrative law. Responsible administrators will simply have to bear in mind that when rights of others are involved in decisions, there may well be a constraint on administrative power to decide by way of certiorari or prohibition.

Legal Consequences. The classic statement of the modern scope of these orders is to be found in Atkin's L.J. comment in R. v Electricity Commissioners (1924) 1 K.B. 171, 205.

> The operation of the writs has extended to control the proceedings which .... would not be recognized as courts. ...Wherever any body...having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of their legal authority, they are subject to the controlling jurisdiction...exercised in these writs.

In brief, the writs offer legal remedy. They are prerogative in the sense that their issuance lies within the prerogative of the court. Their scope is to "control the proceedings". It is the process of decision making - not the determination - that is subject to constraint.

Claude Thompson (1971:41) distinguishes the effect of "Certiorari" from that of "Prohibition".

> A motion for certiorari is available when we wish to quash a decision...allegedly made without jurisdiction. A motion for prohibition is brought when we wish to prevent...a proceeding to hear and determine a matter over which it has no jurisdiction.

This simply means that the court is limited to supervising those

decisions by setting them aside (Certiorari), or preventing their exercise (Prohibition) which are made in circumstances deemed abuse of jurisdiction. This abuse of jurisdiction can occur in several ways.

Jurisdictional Abuse

The most obvious instance of jurisdictional abuse occurs when an administrative body or officer acts completely outside of its statutory power. Morden (1967:287) notes:

> For our purpose it is sufficient to say it (jurisdictional excess), covers the area of (1) what matters can be lawfully decided and (2) by what procedure should they be decided.

The significance of this latter statement as it applies to educational administrators is simply that the exercise of a legally acceptable power to decide in terms of jurisdiction not only refers to the "matters" that can be decided, but also to the "procedure" of decision making.

To decide a lawfully acceptable matter in a lawfully procedural manner is to act within legal jurisdiction. To do otherwise is to act beyond jurisdiction and hence to invite the court to quash or set aside the decision so made. "Process" and "matter" are both inherent to jurisdiction. The issue of "matter" begs the question as to who has the power (status) to decide? The issue of process begs the question as to what is the standard of procedure required? That standard, in terms of Canadian law, is framed by the legal concept of "Natural Justice".

That natural justice, in Canadian legal jurisprudence, is inherent to jurisdiction is noted by Riley J. of the Alberta Supreme Court: Regina v Canada Labour Relations Board, Ex Parte Brewster Transport Limited (1966) 58 D.L.R. 615.

> Natural justice, is of course, a question that goes to jurisdiction.

For the educational administrator, charged with making decisions affecting the right of others, this means that the process of decision making, in order to be within the scope of his jurisdiction, must be made in conformity with the rules of natural justice. Such rules are the subject of comment at a later point in this chapter.

The abuse of jurisdiction is not limited to mere excess either in terms of matter considered or the manner of exercise of the decision making process. Other abuses of jurisdiction deemed sufficient in Canadian law to invite certiorari or prohibition are set out in the case of Martin v Mahoney (1910) 2 L.B. at 731, and commented upon by MacKinnon B.J. (1961:289).

> In Rex (Martin) v Mahoney you have a statement as to when certiorari will lie....Certiorari is applicable as follows:
>
> (a) Where there is a want or excess of jurisdiction.
>
> (b) When in the exercise of jurisdiction, there is an error on the face of the adjudication.
>
> (c) Where there has been an abuse of jurisdiction as misstating the complaint, etc., or disregard of the essentials of justice and the conditions regulating the functions and duty of the body.
>
> (d) Where the administrative body is shown to be disqualified by likelihood of bias or by interest.

(e) Where there is fraud.

The recent case of The Board of Trustees of The Edmonton School District v Malati (1970) 74 W.W.R. 434, arose when the district board decided to dismiss Mr. Malati after an investigation into allegations of misconduct on his part involving a number of girls, most of them students at the school, and some of them students in his class. Mr. Malati appealed this decision to the Minister of Education, as he was allowed to do by the Act. The Minister ordered the school board to reinstate him. The school board subsequently appealed the process of decision making by the Minister to the courts.

This appeal by the board was upheld on the basis that the Minister had made an error in law as to the interpretation of the term "gross misconduct". In law this error was held to amount to "an error appearing on the face of the record". As such this error of interpretation was sufficient to allow a writ of Certiorari to set aside the Minister's decision.

Natural Justice

The standard of procedure required to be observed in the exercise of the quasi-judicial decision making process is generally referred to as natural justice. These rules have their basis in law and are the subject of comment by Morden J.W. (1961:298). He refers to the leading English case of Local Government Board v Arlidge (1915) A.C. 120, 130, quoting Lord Haldane:

> They (the decision makers) must deal with the question referred to them without bias and they must give to each party the opportunity of adequately presenting the case made.

The difficulty of the Canadian law is noted in the case of Regina v Registrar of Building Societies, Ex Parte A. Building Society (1960) 1 W.L.R. 669, 676 per Parker C.J.

> I always find the expression "natural justice" very difficult. There is no one code of natural justice which is automatically imported into any procedure...

Morden (1961) comments:

> This statement clearly indicates the futility of attempting to analyse all of the cases where either the applicability of the rules of natural justice or their specific content were involved with a view to ascertaining hard and fast principles.

That the rules of natural justice are matters of practical real law as opposed to being based in a natural law is established by Byles J. in Cooper v Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180; 143 E.R. 414.

> Although there are no positive words in the statute requiring that a party shall be heard, yet the justice of the Common Law will supply the omission of the legislature.

Horwitz J.C. (1971:261) has noted some of the major specific rules which have been applied in defining rules of natural justice in specific Canadian cases:

1. Notice of hearing or intention to make a decision should be given to the party whose right may be affected.
2. The party whose rights may be affected should be sufficiently informed of the case he has to meet so as to make adequate reply.
3. A hearing should be held wherein adequate opportunity to make a reply is afforded.
4. The authority must act judicially (quasi-judicially), without bias.
5. The tribunal or body making the decision should be

> constituted in the same manner as when evidence was being adduced and arguments heard.

The comments above as derived from Canadian law will provide the educational administrator with a framework as to the process required in making decisions that affect the rights of others. Such rules represent the Canadian approach to the American legal concept of Due Process.

Legal Trends

The conflict between the Estevan and Cardinal case noted herein (p) suggests inconsistency in Canadian law.

It is submitted that a survey of the older legal cases will fail to establish solid principle; hence it is modern law that must be the center of focus. Professor Innis (1971:11) in doing this notes:

> My broad reading is...once again, simply that...the courts are more ready than ever to control the activities of administrative tribunals.

The same author notes the more recent cases on natural justice and suggests that they tend to support an increasing tendency of the courts to issue Certiorari or Prohibition. In this regard the significant case of L'Alliance Des Professeurs Catholiques de Montreal v Quebec Labour Board (1953) 2 S.C.R. 140, wherein Rinfret C.J.C. noted:

> The principle that no one should be condemned or deprived of his rights without being heard and above all, without receiving notice that this right would be put at stake is universal equity.

Kerwin J. stated:

> I think the true view is, that since the legislature must be presumed to know that notice is required by the general rule, it would be necessary for it to absolve the board from necessity of giving notice.

The decision complained of was one by the board of revoking the certification of the teacher's union while it was admittedly involved in an illegal strike.

It is submitted that the above case indicated that the courts will, in interests of natural justice, interfere in the decision making processes when they affect rights unless the legislature, in its wisdom, passes statute law preventing such interference. If this trend persists, then the decisions of educational administrators as they affect the rights of other will increasingly come under the supervision of the courts.

Redress By Mandamus

The McRuer Report (318) distinguishes the remedy of Mandamus from the remedies of Certiorari and Prohibition. An order for Mandamus issued by the court "commands performance of a public duty".

Furthermore, the authority of the court to issue such a command is not solely restricted to issuing such order against decisions of a quasi-judicial or judicial nature, as is the case in issuance of orders for Certiorari or Prohibition. Mandamus can compel a purely administrative decision to be made.

Quite clearly, the educational administrator is charged with performance of public duty and hence is subject to the court's

supervisory function. It follows that understanding the legal concept of "public duty" is essential to an understanding of administrative responsibility.

Public Duty. Laux (1973:182) categorizes public duties under two heads:

1. A duty to do some definite act in defined circumstances.
2. A duty under defined circumstances to make a decision in the sense of hearing, considering and deciding.

A duty to perform a definite act in defined circumstance is a feature of most provincial acts relating to education. One example from the School Act of Alberta suffices; Section 146 (3) R.S.A. 1970 reads:

> Where a principal suspends a student (defined circumstances), "the principal shall immediately report in writing all the circumstances of the suspension to the pupil's parents" (the duty to perform a definite act).

1. The principal who fails to perform this duty, upon being faced with a demand to do so by an aggrieved parent, could well be ordered to do so by the court by way of issuance of a writ of mandamus - "commanding performance". In brief, educational administrators simply cannot decide not to perform public duties.

2. The duty to hear, consider and decide under defined circumstances is noted in Section 146 of the Alberta School Act subsection six which reads as follows:

> "A pupil expelled from school or his parents" (defined circumstance), "may appeal to the Minister" (a duty on his part to hear, consider and decide). "who may in his discretion reinstate the pupil or confirm expulsion" (a duty to act).

The above section provides a clear example of a mandatory duty on the part of the Minister to "hear, consider and decide". He cannot in law decide not to hear the appeal although the law will not interfere with the substance of his decision, be it expulsion or be it re-instatement. It follows that educational administrators are under legal duty to hear, consider and decide. In brief, a decision not to decide can be the subject of a court command enforced by way of Mandamus.

The Imposition of a Duty. A duty can be imposed by statute and it is clearly imposed by the use of the word "shall" in the statute. It would seem to follow that the use of mere permissive words or enabling words such as "may" would not be sufficient in law to establish a duty.

Canadian courts have not restricted themselves to such an interpretation of the law and they deem it within their prerogative when considering the statute as a whole to interpret it in such a way that a public duty is deemed to exist.

The case of Labour Relations Board of Sask. v R. (1954) 13 W.W.R. N.S. (1) held that enabling words, apparently permissive in meaning, in law would be construed as compelling performance of a duty when the courts considered such words to "effectuate a legal right".

It is submitted that the educational administrator is constantly faced with making decision "effectuating a right", and hence in these cases he must decide and cannot in law refuse to act; or

hear, consider and decide as the case maybe. In more simple terms, this means that procrastination can invite court compulsion.

Performance. In Canada the case of Kipp v Attorney General of Ontario (1965) S.C.R. 57 established criteria to determine in law situations deemed to indicate a failure to perform.

1. By showing a demand by a person entitled to have the duty performed and a refusal by the authority concerned to do so.
2. By the showing of a conduct that implies a refusal.
3. By showing that a purported decision of the board is ineffective or Ultra Vires.

Legal Trends: Issuance of Mandamus. It is not proposed to examine the many cases which simply show the numerous legal complexities inherent to acquiring an order for Mandamus. It is submitted that the purposes of the educational administrator are best served by considering the trends of law as they relate to the decision making process. The comments of Brewin Q.C. (1961:274) are enlightening in this regard:

> Our Canadian courts seem to express rather contradictory views...In some cases Mandamus is described as an extra-ordinary remedy only granted in clear cases. In other cases the same courts have said that Mandamus is a highly beneficial remedy to be liberally interposed for the benefit of the subject.

The same author continues to review the cases and suggests that the courts will adopt the broad interpretation since the reasons which have heretofore been followed to deny issuance are not as strong as those supporting the broad view.

The implications for the administrator become clear. Their

duty to act, and their duty to hear, consider and decide must be faced up to. If they fail to do so the courts may well enforce performance.

Redress by Way of Common Law Remedy

The harmful effects of decisions can be rectified to some degree by application of common law remedy. Clearly contractual rights can be adjudicated upon by courts. This aspect is well covered by McCurdy (1968). Similarly it is obvious that an administrative decision which breaches criminal law is subject to court imposed restraint. These remedies will not be dealt with further at this point. The question as to whether or not an action will lie in an action of tort for damages arising as a result of decision making which harms the private rights of other is still a moot point, (Laux, 1973).

The most significant case in support of the contention that administrators may be personally liable for implementing decisions which harm others is that of Roncarelli v Duplessis (1959) S.C.R. 120.

In this case Duplessis was held personally responsible for the monetary damage which arose from a decision made on an irrelevant basis that affected the livelihood of Roncarelli. In fact, Duplessis ordered the suspension of his liquor licence and thereby drove him out of business. The case, however, stands on section 1053 of the Quebec Civil Code and hence cannot be cited to support a similar

action in the common law provinces.

However, the comment of Wade (1951:67) quoting Chief Justice Holt in the English Common Law case of Keeble v Hickeringill (1705) 11 East 574, 576 suggests the possibility of a valid action in tort.

> Where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood, there an action lies in all cases.

The state of the law is confused but there is some support in law for the notion that an administrator may be personally liable for decisions made in an arbitrary way that affect the rights of others and that an action for monetary damages will lie.

Redress By Way of Equitable Remedy

Although prerogative in the same sense as the prerogative writs of Certiorari and Prohibition, the declaratory judgement as a remedy is not restricted to exercises of quasi-judicial power. In addition to the other equitable remedy of injunction, these remedies can and do impinge upon the purely administrative or discretionary exercise of decision making power as exercised by administrators.

The Declaratory Judgement. The constitutional basis to issue an equitable remedy lies within the powers of the superior courts of each province. Laux (1973:220) notes that declaratory judgement as a remedy has two roles:

> Firstly, it may be used to make a simple declaration of the applicants legal position, e.g. his rights under a contract. Its secondary role is supervisory, in the sense that such a

judgement will declare an illegal administrative decision to be null and void.

The law relating to the grant of a declaratory judgement is complicated and technical in nature. For purpose of this chapter it suffices to note the summary offered by Laux (1973) as he refers to the authoritative text of Professor DeSmith, Judicial Review of Administrative Action. It is to be noted that the categories offered herein are basically those of English Law. It is submitted that they are equally applicable to Canadian Law. The categories of cases noted are:

1. Where subordinate legislative instruments are impugned - e.g. used to attack the validity of regulations made by administrative boards or the by-laws of local government units.
2. Where administrative acts, orders or decisions are impugned.
3. Where orders of a judicial character are impugned.
4. Where there is a dispute as to personal status.
5. Where the rights of public employees are in dispute, e.g. school teachers ... have been awarded declarations that notices of dismissal or suspension served upon them were invalid.
6. Where an individual wishes to have declared a right to pursue a trade or occupation or activity which has been denied by competent authority.
7. Where there are assertions of fiscal rights or privileges, e.g. various expropriation proceedings.
8. Where a public authority wishes to know the extent of its own powers.
9. Where an individual wishes to establish the scope of a public duty.

It is quite clear that many categories noted above affect decisions made by educational administrators. The law relating to application of the remedy is technical and complicated and is not the subject of deep inquiry in this chapter.

In principle, the fact that a declaratory judgement is available, even though its availability is legally limited, should be considered by administrators in formulating controversial decisions. Indeed, it may be the most appropriate way for an administrator to test a decision prior to its actual implementation. A decision to make the language of instruction the language of English only may well be controversial. The educational administrator could seek a declaratory judgement as to the validity of such a decision prior to its actual implementation. There is no need to await court action initiated by one who feels aggrieved.

<u>The Injunction</u>. Laux (1973:216) notes:

> An injunction is a court order addressed to a party requiring that party to do or refrain from doing a particular act.... It can be obtained against any administrative agency whether its function is judicial, (purely) administrative or legislative.

This clearly brings the remedy of injunction within the ambit of a constraint upon the decision making powers of Departments of Education, local boards, and educational administrators working in virtually every field of education. It matters not whether the process is quasi-judicial or purely administrative (discretionary).

Laux (1973) notes the limitations of the remedy under six heads. No action for injunction will lie:

1. If the injury complained of is trivial.
2. If the injury has ceased.
3. If some other remedy is equally available.
4. If the injunction order is impossible to comply with.
5. If the applicant is guilty of delay.
6. If the applicant is himself guilty of some wrong.

The remedy is deemed as equitable since it developed as a remedy available from the court of chancery - a court of equitable jurisdiction. The jurisdiction to issue injunction is well established in Canadian law.

The nature of the remedy is such that it may be prohibitive or mandatory and the courts can issue such remedy on an interim or permanent basis.

Willis (1961:81) comments upon the scope of injunction as a constraint on the decision making process.

> Of all the forms of equitable relief the injunction is without doubt the most useful ... It will be granted for the protection of legal as well as equitable rights. It can be used in cases of tort, breach of contract and the preservation and protection of real and personal property...
>
> On the other hand, there is no other form of relief more susceptible of abuse, and the courts have thus been very guarded to its use.

This chapter does not propose to consider the complicated technicalities of the law which surround the actual issuance of the order. It is submitted that the educational administrator, in the exercise of his decision making powers, is susceptible to the issuance of such a remedy.

The Exercise of Purely Administrative Power within Rule of Law

In brief, the material previously presented suggests that the exercise of the "purely administrative" power to decide is subject to constraint only by way of equitable remedy, declaratory judgement or injunction. It is submitted that such a view is too narrow in terms of law. It may well be that the rules of natural justice are restricted to exercises of quasi-judicial power but that is not to suggest that the power to exercise discretion is unfettered.

Innis (1971:22), referring to the English case of Associated Provincial Picture Houses Limited v Wednesday Corporation (1948) 1 K. 233, quotes Lord Green M.R.:

> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of things that must not be done.
>
> For instance, a person entrusted with a discretion must, so to speak, direct himself in law. He must call his own attention to the matters he is bound to consider; he must exclude matters from his consideration which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said to be acting unreasonably.

This simply means that in English law unfettered discretion simply does not exist. It is bound by the legal constraint of "reasonableness". Innis establishes his point by noting an example wherein a red-headed teacher is dismissed because she has red hair. That is "unreasonable".

> The crucial phrase is that the decision maker must exclude from his consideration matters which are irrelevant.
>
> To the extent that this law is adopted in Canada,

the decision maker in education is bound by the legal constraint of "reasonableness". That such a concept has been applied in Canadian law is established in Smith & Rhyland Limited v R (1935) S.C.R. 95, and in the previously referred to Roncarelli Case (1959) 16 D.L.R. 685.

Justice Rand in the latter case noted:

> No legislative act can without express language be taken to contemplate an unlimited arbitrary power exercisable for any purpose...Discretion necessarily implies good faith in discharging a public duty. There is always a perspective within which a statute is intended to operate.

It is submitted herein that the test of "relevance and reasonableness" noted in English law is identical to what Rand refers to as "a perspective within which a statute is intended to operate".

Innis (1972:23) concludes that English cases continue to attack the concept of unfettered discretion whereas Canadian courts appear to "equivocate".

It is submitted, however, that a legal basis in terms of case law is established in Canada for constraint of the purely administrative or discretionary power.

Supplementing the above noted case law is positive statute law eroding discretionary powers. Specifically, the Ombudsmen acts of the various provinces have created an organized structure for interference in virtually all areas of decision making.

It is not proposed to study all such acts in detail since their general pattern is the same. Laux (1973:119), in noting the

functions of the Ombudsman, describes the structure in the following terms:

> Like the Provincial Auditor, he responds to, and is accountable only to the legislature...It is not his function to overrule decisions of responsible officials or to institute proceedings of a punitive nature for wrong doing or malfeasance in office, but rather to assist the ordinary citizen who feels... he has been done an injustice.

This simply means that all manners of educational decisions are open to scrutiny since the educational administrator operates in a public context.

This chapter is best concluded with the comments of Professor K.C. Davis (1969:57), as he asks the question:

> How can administrators structure the exercise of their discretionary power, that is how can they regularize it, organize it, produce order in it, so their decisions affecting others will achieve the quality of justice.

To this challenge he responds (98):

> The seven instruments that are most useful in structuring discretionary power are:
>
> 1. Open plans.
> 2. Open policy Statements.
> 3. Open rules.
> 4. Open findings.
> 5. Open reasons.
> 6. Open precedents.
> 7. A fair informal procedure.

It is submitted that this simply means that the educational

administrator who decides in a climate of openness is in fact an educator who values the concept of rule of law.

Chapter Summary

This chapter applies basic concepts of Canadian administrative law to the specific tasks of hearing, considering and deciding as carried out in the process of decision-making by educational administrators.

Clearly the power to decide as practiced by educational administrators is administrative rather than judicial since educational administrators are concerned with matters of policy.

The process of exercising that power is a major concern of this chapter which suggests that quasi-judicial processes with their emphasis on concepts of natural justice are required to be followed in those decisions which affect rights of others. The exercise of discretionary or purely administrative processes are considered in terms of the legal requirement to act reasonably.

The last portion of this chapter notes the various remedies available to those who would challenge decisions of educational administrators. The failure to utilize quasi-judicial processes when required invites the setting aside or prohibition of decision implementation. A failure to act invites court intervention compelling the act of decision-making. In addition the equitable remedies of injunction and/or declaratory judgement are briefly noted.

In summary, this chapter suggests that the decisions of educational administrators are subject to legal challenge and that legal challenge takes its form by challenging the processes of such decision-making. It follows that educational administrators should follow lawful processes as they practice their tasks of hearing, considering and deciding.

Chapter 4

THE PROVISION OF EDUCATIONAL PROGRAMS: LEGAL ASPECTS

The provision of educational programs is a traditional task performance requirement of Canadian educational administrators. It is their responsibility to see to the provision of suitable programs within appropriate educational settings for the benefit of the student. The quality of performance of this task and the legal necessity to perform to a legally acceptable level is the major concern of this chapter.

Whereas Chapter Three looked to the processes of decision-making, this chapter looks to the process of professional implementation in general, and to the implementation of decisions relating to provision of educational programs in particular. This chapter looks to the level of standard of care required to be followed by a professional educator in performing the professional task of providing educational programs.

It is not new ground to analyze or comment upon the legal implications of administrative tasks. Bargen (1961), Enns (1961), and Lamb (1957) have previously done so. The thrust of this chapter is to extend further some of those studies. In particular Bargen (1961) has looked at the concept of the "rule of law" in relation to instruction. Chapter Four of his thesis looks to some of the specific legal requirements demanded by Canadian law in the task of

providing instruction. These include:

1. The legal issues of religion.
2. The legal issues of language.
3. The legal issues of patriotic exercises.

The text which follows examines an aspect untouched by Bargen. Specifically this chapter considers the question as to; What is the legally required standard of care required in performance of the task of providing educational programs which will benefit students? This chapter speculates as to the nature of that legal requirement.

Doctors have a standard of care to which they must adhere. Failure to do so renders them liable to a court action. Action against medical practitioners can be based on the legal concept of contract or upon the legal concepts of tort. In tort law such an action is referred to as "mal-practice". The comments which follow concern themselves with an idea I conceive of as being administrative mal-practice, and it is this concept of administrative mal-practice in provision of educational programs which extends the ideas of previous writers.

The question of an administrative mal-practice in education takes on a legal significance when harm occurs to a student by reason of his "non-learning". In actual fact, Stephen Sugarman (1974:233) reports that such a claim has been already filed in the United States. The claim alleges damage by way of "non-learning" attributable to the improper provision of learning services. He comments on the impact of such a case:

> In the past year the possibility that non-learners might sue the public schools for money damages has become a reality. A well-publicized suit has been filed by a high school graduate, Peter Doe, who asserts that his functional illiteracy is his school's fault. His claim for $1 million from the San Francisco Unified School District has already led to a national conference on suits by individuals against schools, reports of the case in educational journals and in the press, and a discussion of the suit at the annual convention of the National Education Association.

The Peter Doe Case

The facts and issues at law for this particular case are set within the legal jurisdiction of the United States. The educational issue, namely the adequacy of the levels of performance of tasks related to the provision of learning services, is not restricted by national borders and is of concern to the Canadian educational administrator.

The case summary noted below, while retaining its United States flavor, can be placed within a Canadian legal framework. The Canadian legal perspective will be superimposed at later points in this chapter.

The following factual summary is attributable to Sorelsky (1973:590):

> The following is a brief summary of the facts and legal contentions in Peter Doe v San Francisco Unified School District, as of March 9, 1973:
>
> On November 20, 1972, an action was filed in San Francisco Superior Court against the San Francisco Unified School District, its Board of Education and Superintendent of Schools; the State Department of Education, its Board of Education; the State Superintendent of Public Instruction; and 100 defendants alleged to be the agents or employees of public agencies.
>
> The plaintiff is an 18-year-old Caucasian male high school

> graduate. His IQ as determined by the San Francisco School District is normal. During the course of his 13 years in the San Francisco public schools, he maintained average grades, never encountered any serious disciplinary problems, and maintained regular attendance. He advanced year by year through the public school system until he was awarded a high school diploma. At various points throughout his school career his parents expressed concern over his apparent difficulty in reading. They were repeatedly assured that he was reading at the average level and had no special or unusual problems.
>
> Shortly after high school graduation, the young man was examined by two private reading specialists. Both indicated that he was reading at approximately the fifth-grade level. Since these tests, he has engaged in private reading tutoring and has made "significant progress" in improving his reading level.
>
> The complaint contends that "Peter Doe" -- his name is being concealed for obvious reasons -- has been deprived of an education in the basic skills of reading and writing as a result of the acts and omissions of the defendants.

An analysis of the Peter Doe case raises two legally fundamental issues, namely:

1. Peter Doe's constitutional right to an education.
2. The legal requirement demanded in the level of care in the task of providing educational programs.

The purpose of the following material is to consider and speculate upon the same set of facts as illustrated in the Peter Doe case as if the matter had occurred in Canada.

Peter Doe in Canadian Constitutional Context

The constitutional issue begs the question: Does Peter Doe have a right to receive an education? Bargen examined the question of the constitutional right of the Canadian child to receive an education. His conclusion notes (1959:103):

An analysis of the court decisions on this matter leads one

> to conclude that education is not so much a right or privilege as it is a duty imposed upon the child.

The comments of Sorelsky on the reliability of constitutional attack in terms of United States law are equally of interest. He comments (1973:593):

> The constitutional approach has been successful in overcoming barriers to equal access, equal opportunity, and equitable allocation of resources. The issues in Peter Doe, however, are far more complex. Furthermore, the Supreme Court's Rodriguez decision, stating that education is not a right explicitly guaranteed by the federal Constitution, now casts a pall over the possibilities of such an approach through the federal courts.

Bargen (1961:60) notes that there was no statutory or common law right but rather that the right to an education is a civil right and is not absolute or unqualified.

Education: A Civil Right?

Both the American and Canadian school administrator must look to their respective constitutions to ascertain the legal foundations for civil rights to an education.

The rationale of the United States constitution is to legally enshrine specific personal rights and to clearly set them forth and record them in a formal distinct constitutional document. Thus amongst other rights every person of that nation is guaranteed certain substantive rights, some of which include the right to express opinions, the right to assemble, rights of religious practice, right to petition, and right to assemble. In addition to safeguarding substantive rights,the Constitution of the United States establishes the right of due process. There is no enshrinement of the personal civil right to an education.

The B.N.A. Act, unlike the American constitution, does not guarantee basic human rights. Rather the Act functions to allocate defined exclusive legislative powers to the Federal or Provincial components of the Canadian State. It follows that the Canadian educational administrator who wishes to pin-point student rights must be aware of the legislative powers of each of these two law-making political entities for each of these jurisdictions possesses distinct and unique power to make law. As well each component has distinct constitutional restrictions on their authority to legislate.

The legal difficulties in ascertaining a constitutional basis in Canadian law for any of the civil rights including education has been the subject of comment by a leading Canadian legal writer. D.A. Schmeiser has commented (1964:13):

> At least six different views have been propounded in Canada about the constitutional position of basic liberties.

Without proceeding further into the technical discussion of judicial interpretation it suffices to note the six positions as outlined by Schmeiser.

1. The provinces possess unlimited legislative jurisdiction.
2. The Federal government possesses unlimited legislative jurisdiction.
3. That neither Federal or Provincial legislatures possess exclusive legislative authority and that the authority to legislate is determined by the aspect of civil rights concerned.
4. That neither Federal or Provincial legislatures can legislate infringement. That neither the Federal or

Provincial legislatures have power to legislate infringements of basic rights - since such rights are inherent to the B.N.A. act itself.

5. That basic liberties are guaranteed by implication. One illustration offered by Schmeiser is simply that the B.N.A. act by creating a Parliament implies "a political society where freedom of speech and political association exist".

6. That rights founded upon natural law cannot be obliterated by positive law.

Bargen placed the specific student right to receive appropriate educational programs within the broad area of civil rights. If Peter Doe was to so claim in a Canadian Court he would be faced with the horrendous legal complications of interpretation as noted above by the comments of Schmeiser.

To speculate further is not the point of this thesis. This writer is unaware of any Canadian case going directly to this legal issue. It could well be that other remedies are simply more legally effective.

Peter Doe in Canadian Legal Context: Negligence

The issue of negligence in task performance is as legally apropos in Canada as it is in the United States. The legal attack in Canada would take the form of asserting that school authorities should be held liable, as noted by Sorelsky (1973:594), in that they negligently failed to provide the plaintiff student with adequate instruction, guidance, counselling and/or supervision in basic academic skills, and negligently failed to ascertain accurate information as to the student's educational progress.

The legal principles inherent to the commission of the tortious act of negligence have been analyzed by Bargen (1961). In brief the legal basis for an action of negligence demands:

1. Circumstances which give rise to a duty to take care by the educator to the student.
2. A failure on the part of that educator to maintain a standard of care deemed adequate in law, i.e. an inadequate level of task performance.
3. An actual damage or harm suffered by the student.

This chapter portion aims to go beyond Bargen's (1961) analysis. In particular the legal concepts of "Standard of Care" and "Resulting Harm" will be considered. The method of such consideration will be to consider the nature of the relationship of the educational administrator to the student.

What are the duties of that relationship? What is the standard of care? These are the questions begged by the "Peter Doe" case as seen through Canadian eye-glasses as framed within the concepts of negligence. These are also questions of importance for the practicing educational administrator.

Two particular kinds of relationships are noted herein:

1. that relationships which exist by reason of duty owing from one party to the other; a relationship framed in the law of tort. When such a relationship is deemed to exist in tort law, then such tort law will impose a standard of care.
2. that relationships which results from the idea that consideration in terms of money is paid for performance of tasks; a relationship framed in the law of contract. When such a relationship is deemed to exist as a matter of contract, then contract law will determine the level of care in terms of breach of contract.

The first of these relationships is of greater educational significance and hence only that relationship as recognized by tort law will be discussed herein. That such a relationship does exist in tort law has already been the subject of analysis and comment by Bargen (1961). He concludes that this relationship exists and imposes a duty to perform tasks on the part of the educational official and that such duty is owed to the student.

Standard of Care - Tort Law

Bargen's study (1961) suggests that the concept of a "reasonable" and "ordinary" man's conduct provides the standard by which the law will test the adequacy of the standard of care demanded in task performance. In so far as the test for general negligence is concerned one cannot but agree. A brief review of the standard of care is noted in the Canadian Encylopeadic Digest (320):

> When it has been shown that a duty to take care arises it is necessary to consider the standard of care to be applied; this is a question of law; ordinarily, the standard is that of a reasonable man, that is to say, reasonable care in the circumstances.
>
> The care which is required of a person in order to avoid liability for negligence is not that which will avoid an accident in all events, but that which an ordinarily prudent man would exercise under the circumstances.

But does the law see those who possess special skills as being "ordinary" men? Doctors have special skills, lawyers have special skills, educational administrators have special skills, teachers have special skills. Is a higher standard of care required by those who hold themselves out as being more than "ordinary" by virtue of their

professional training?

The law of tort has recognized that the test for general negligence is not adequate in some cases. In particular the relationship between doctor and patient gives rise to a greater degree of standard of care. B.J. Thompson Q.C., a Canadian lawyer discussing Canadian law,has noted (1971):

> The standard of proficiency imposed by law is that of "the ordinary competent medical practitioner" or, otherwise expressed as "that generally possessed by practitioners in similar communities or similar circumstances". The highest standard should not be exacted of every doctor and a particular doctor should not be held negligent merely because some other doctor's diagnosis or treatment might have been more skillful.

At a further point on the same page he continues:

> Note that this standard differs somewhat from the standard of "the reasonable man" in the general law of negligence. A doctor represents that he possesses special skill or knowledge in the conduct of his particular profession and the law demands that he in fact possess that skill or knowledge. So the medical standard is the conduct of the reasonable member of that profession.

D.A. Keith Q.C. (1963:203) in discussing the relationships of hospital and doctor to patient delves further into the legal authorities supporting the proposition that, in general, higher levels of standard of care are owed by learned persons. In alluding to Dr. Charlesworth's text on negligence, Keith comments (203):

> A man who practises a profession is bound to exercise the skill and competence of an ordinarily competent practitioner in that profession. 'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There

> may be persons who have higher education and greater advantage than he has, but he undertakes to bring a fair, reasonable and competent degree of skill.'
>
> The same rule applies to any man exercising a skilled trade or business. 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well ... for it is the duty of every artificer to exercise his art rightly and truly as he ought.'

This simply means that Keith is pointing out that skilled persons, be they doctors or otherwise, are required to perform to the standard of a reasonable member of that profession. In support of this proposition he notes the common law authority of <u>Lamphiere v Phipos</u> (1838) S.C.& P. 475. That is the case supporting the rule: "For it is the duty of every artificer to exercise his art rightly and truly as he ought".

There is Canadian case law support for the views expressed by Keith. Lawyers, dentists, engineers and trade contractors have all been required to meet this higher level of standard of care. They must go beyond the standard of care of an "ordinary" man when performing the skills of their profession or trade.

The traditional view of the law of standard of care as it applied to supervision or discipline has been that the teacher or official must exercise the standard of care of a reasonable parent. Although Bargen has already examined that traditional concept, he did not consider the standard of care required in teaching. The question remains: At what point must educational administrators perform at a standard of care which goes beyond that standard demanded of an "ordinary" man? At what point must the educational administrator

meet the standard deemed in law to be a reasonable one within the discipline of educational administration? At what point does educational mal-practice begin? The Peter Doe case begs these very questions and in this sense comes close to the cutting edge of educational law in Canada.

Traditionally the law has stopped short in applying the comments of Lamphiere v Phipos to teachers. To date teachers and other educational officials have been subject to legal action because of physical damages occurring to students. When the issue has been the physical care of students then the legal test applied to the performance of educational officials has been to apply the test of a reasonable or prudent parent. This traditional legal view was thoroughly considered by Bargen (1961).

The legal significance of the Peter Doe case is that at least two of its legal aspects are of importance to those who administer educational programs.

Firstly, unlike previous cases which involved a physical injury consequent upon a failure to take care (as required by an ordinary prudent person), Peter Doe would test, in terms of law, the performance of skill requiring tasks as performed by those professing to have the specialized skills necessary to perform such tasks. Peter Doe claims that the failings which caused him harm resulted, not from a failure to perform ordinary tasks in an ordinary and prudent manner, but rather that professionally and legally qualified educators failed to perform educational tasks in a manner which the law would

hold their profession would deem reasonable. Specifically "Peter Doe" claims unreasonable performance of professional skills, a professional mal-practice, in that the tasks of providing an adequate program, evaluating progress, and of providing adequate teaching generally were not performed to a standard of care to which a reasonable educational administrator must adhere.

In summary, the Peter Doe case can be distinguished legally from those earlier cases of educational negligence as noted by Bargen (1961). The point of distinction is simply that "Peter Doe" attacks performance of the specialized, skilled professional tasks inherent to the recognized discipline of educational administration. By so doing, Peter Doe clearly brings educational mal-practices within the meaning of Lamphiere v Phipos. The result may well be that educational administrators and/or teachers will, like doctors, lawyers, engineers, architects, and contractors have to perform tasks in reasonably professional manner. No longer will the "ordinary man" test prevail to legally measure performance of professional tasks.

This simply means that educational administrators are not only ethically and professionally responsible for performance of tasks to a reasonable professional degree, but that they are also legally liable to account if they fail to do so.

The second point of importance in both the legal and educational sense relates to the problem of "harm" as claimed by Peter Doe.

Harm and Damages

The specific law relating to harm and damage is a very complicated part of the general tort law. Even so, educational administrators should have a legal sensitivity as to the "kinds" of harm for which they are liable. They should have a "feeling" as to the legal extent of consequences following upon a negligent act.

Kinds of Harm.

Bargen's thesis when seen in the framework of the Peter Doe case begs the question as to what kinds of harm the law will compensate. Bargen's study limits itself to a study of physical injury. Peter Doe claims not a physical injury but rather an economic loss. Specifically he claims harm to his ability to earn a living. He claims loss of economic potential. Peter Doe has not been physically harmed, but claims he has suffered a loss of earning potential. In Bargen's time it is most unlikely that a claim for pure economic loss would be successful, for economic loss per-se was not considered a "harm" in the legal sense of that word.

Linden (1968:202,203) describes developments in Canadian tort law as to the liabilities accruing from harm deemed purely economic. He notes:

> At one time there were certain types of detriment that could not be made the basis of a negligence action. Negligently caused mental shock, for example, would be compensated only in special circumstances. The same was true of negligently caused economic losses. The mental shock exception has virtually disappeared in recent years, however, and the economic loss rule seems to have been transformed into the

> "secondary" or "relational loss" principle, which will be discussed later. It is still open to the courts, of course, to declare certain other forms of detriment outside the scope of negligence liability (mere inconvenience, and interference with privacy seem to be possible candidates for exclusion) but at the moment it seems possible to say that virtually every form of substantial harm can be made the basis of an action for negligence.

Within this same article the author (210) points out that the old concept of a requirement for physical harm to exist in order to base an action for negligence still receives some legal support. This support to deny pure economic loss falls under the rationale of "relational loss".

> At one time it was widely accepted that the law of negligence provided no remedy for purely economic losses unless accompanied by some form of physical injury or damage. Thus, a tugboat owner who lost the opportunity to earn money towing a ship that was negligently sunk by the defendant, and an employer forced to pay workman's compensation to an employee injured by the defendant, both failed in claims against the defendant. The decision in Hedley Byrne v Heller, that purely economic loss stemming from at least some forms of negligent statements can support a negligence action, punctured the rationale of these cases, but most of the actual decisions have been salvaged by the discovery of a new rationale: that the law of negligence does not protect "relational" or "secondary" interests.

It is obvious that in Canada the status of "purely economic loss" as a harm is not established in principle. Each case stands on its own merits. The same author notes (211):

> It may be an indication of the unsatisfactory nature of the relational interests principle that a substantial number of exceptions to it may be listed. A husband may sue for loss suffered by him as a result of the negligent injury of his wife, and an employer may similarly sue for loss due to the negligent injury of his employees. In an increasing number of cases, persons who suffer mental shock as a result of injuries negligently caused to someone else have successfully sued. And so on. There is no discernible principle for determining which

kinds of relational losses will be compensated and which will not.

In summary, three legal points bear repetition:

1. That the law as to liability to compensate a purely economic harm is confused.

2. That despite confusion, a change in the view point of Canadian tort law has recognized the concept of purely economic harm as one which warrants compensation.

3. That the applicability of the rules as to the nature of harm depends on the merit of each case. No legal principle of legal applicability is established as of yet.

The points noted above and placed in the context of a hypothetical Canadian Peter Doe case have practical significance for Canadian educational officials. It may be no longer legally sufficient to perform tasks to the required legal standard in only those tasks having potential for physical injury. Tasks which may cause any harm, physical or otherwise, may well be within the ambit for an action based on negligence. Educational administrators must keep their legal eyes focussed on all kinds of task performances which could cause a "harm". This is a wider responsibility than suggested by Bargen since he conceived of an action liable to court recompense in cases of physical injury only.

Failure to provide an adequate level of instruction in an adequate manner, failure to provide programs, failure to follow approved curriculum, failure to provide adequate or competent staff, are all examples of the kind of failure claimed by Peter Doe.

It makes educational sense to provide programs and staff for the benefit of the student. Peter Doe suggests that it is a legal

requirement for such tasks to be done. Peter Doe further suggests that harms which occur as a result of negligence in performance of such tasks amounts to a tortious act against him for which he is entitled to recompense.

Remoteness of Damage

A tortious act resulting in a harm is compensatable. Does this mean that the wrong-doer must compensate the person so harmed for each and every damage arising from that harm? More specifically will the law demand compensation from educational wrong-doers for every consequence of their wrong-doing to a harmed student? Where does the liability end?

Those questions, in legal terms, pose the problem of remoteness of damage. Incidentally, this problem has proved to be a knotty one for application to Canadian law; and it is not the purpose herein to describe the legal complexity inherent to the untying of that knot. The fact that it has become somewhat unravelled since Bargen's work will add some light as to the liability owed by educational officials who perform their tasks in a negligent manner.

In Bargen's time the law was that all damages, be they foreseeable or not, were legitimately compensatable. Two cases referred to as the Wagon Mound have overruled that wide liability.

W.P. Rogers (1967:431) comments:

> No discussion of recent developments in the law of damages would be complete without some words about Overseas Tank Ship (U.K.) Ltd. v Mort's Dock and Engineering Co. Ltd., (1961) A.C. 388; (1961) 1 All E.R. 404 (P.C.), more commonly known to us as The Wagon Mound.

> I do not think it is necessary to go into this case in great detail. As you are all aware, prior to this case the law with respect to what damages were properly recoverable for negligence had been set out by the English Court of Appeal in Re Polemis and Furness, Withy & Co. Ltd., (1921) 3 K.B. 560; (1921) All E.R. 40. Re Polemis established that the criterion of foreseeability applied only to culpability and not to compensation. So long as there was a foreseeable risk of harm arising out of the particular conduct in question, then all damages which were a direct consequence of that act, i.e. those damages which satisfied the test of causality, were properly recoverable from a negligent defendant. In the words of Viscount Simmonds, at page 408:
>
> "There can be no doubt that the decision of the Court of Appeal in Polemis plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences, whether reasonably foreseeable or not".
>
> The consequences of that decision and the practical effect of creating liability are also well-known to you.
>
> The Wagon Mound, insofar as Polemis dealt with the inapplicability of the criterion of foreseeability with respect to what damages were properly recoverable, overruled Polemis and established that in order to be recoverable, damages must have been of a "type or kind" which were reasonably foreseeable by the defendant.

In brief, the educational administrator as conceived by Bargen (1961) was responsible for all damages which occurred as a result of a harm whether or not such damages were foreseeable. The modern administrator need only compensate a person who is negligently harmed for such damages that would be reasonably foreseen by the wrong-doer. The law has reduced the degree of liability.

To apply these rather complicated issues to the Peter Doe case produces a paradoxical result. The trend of the law is to extend the concept of harm yet at the same time that law is moving towards reduction of liability.

This portion of Chapter Four is obvious by speculative as it analyses Peter Doe in Canadian context. It is my speculation that a legalistic,narrow view as to the remoteness of damage would deny compensation to Peter. The question yet remains to be decided in law. Is the damage which occurred to Peter Doe, the loss of earning potential, too remote for compensation even though educational officials acted negligently and caused harm to Peter Doe? I believe that it is.

In conclusion, this chapter is speculative in nature, but at least an argument has been raised to suggest that educational administrators may be held liable for mal-practice in performance of their professional tasks. The concepts of standard of care, harm and damages, have been extended from previous writings. The purpose of this chapter has been not only to speculate upon legal outcomes, but also to provide professional educational administrators with some sensitivity to the rule of law which encompasses all of us.

Chapter 5

SUMMARY

The major thrust of this concluding chapter is to provide cohesion to material presented in previous chapters. It is to this end that the first portion of this chapter will direct itself. It is left to the second part of this chapter to look at future issues and to suggest areas for future study.

Two fundamental assumptions as noted in Chapter One underly this whole study. Those assumptions are:

1. That the rule of law encompasses the educational administrator as he practices the arts of administration.
2. That educational administration is a distinct discipline and as such imposes specific processes and task requirements upon those who would practice that art.

The topics for consideration in this study, their reason for selection, and the method of presentation were discussed in Chapter One. In particular, the aim of this study has centered on the idea that the reader will be able to develop his own sensitivity as to the impact of the rule of law as it affects the daily activities of educational administration. Each chapter considers a specific administrative process and each one of those chapters places a different emphasis on the perspectives of the "rule of law".

Thus, Chapter Two, which discusses communication in terms of libel and slander, does so by emphasizing a description

of the appropriate law. The law is described in terms of its place in the law of torts; it is described in terms of its origins in the common law; it is described in terms of case law and principles of interpretation; it is briefly described in terms of various provincial statutes. In brief, the pattern of Chapter Two emphasizes a descriptive aspect of the law of defamation as it impinges upon administrative practices inherent to the communicative process.

On the other hand, Chapter Three is designed to encourage the reader to develop more than a merely descriptive sensitivity to law. The emphasis is upon application of the rules of administrative law. Indeed the whole concept of administrative law as it relates to the decision-making processes in education demands a sensitivity towards application of such law. The emphasis of Chapter Three is upon application of the principles of administrative law. It is a question of the proper application of the law that determines the lawfulness or otherwise of the decision-making process.

Chapter Four is admittedly speculative. Its purpose is to extend and develop the educational administrator's sensitivity toward legal foresight. This requires a sensitivity to interpreting the demands of the "rule of law" as such law moves in concert with societal pressures. Peter Doe may well be the cutting edge today; tomorrow it will be legal and educational history.

In summary, the format for presentation of chapters Two, Three and Four is developmental in purpose. That purpose is simply to develop the legal sensitivities of educational administrators from

a sensitivity which is merely descriptive, through a sensitivity to application towards a sensitivity of the need to interpret educational law as societal demands present themselves. In brief, the reader is exposed to the wide view as to the rule of law as it impinges upon the practices of educational administration.

Whereas the format of Chapters Two, Three and Four emphasized the development and extension of the educator's sensitivity to the "rule of law", the actual content selection for each of those chapters was made on the basis of importance as task performances expected to be performed by Canadian educational administrators. The material which follows is to provide further cohesion by way of:

1. Consolidating the legal issues of each one of those chapters.
2. Presenting or restating those implications of importance to educational administrators.
3. Suggesting specific administrative procedures where apropos.

Communication and Defamation

The legal rules of importance are noted below and consolidate the legal principles as noted in Chapter Two.

1. It is only when the subject matter of the communication comes to the point of bringing discredit to another or when it comes to a point wherein others are induced to shun such person, that the legal issue of defamation arises.
2. It is only when such defamatory material is made known to others (i.e. published) that legal liability may arise.
3. The legal consequences for publishing defamatory material fall upon the publisher. The person who bears or maintains such defamatory material faces no legal liability.
4. Accidental or unintentional publication cannot act as an

excuse to prevent legal liability.

5. That publication which arises as a consequence of inadequate custody of defamatory material placed the custodian in the legal position of a publisher.

6. That the person who transmits defamatory material to another is clearly a publisher.

7. That the onus falls upon the publisher to establish legal circumstances which protect publication from consequent legal liability.

8. That the two occasions which protect publication go to issues of privilege and justification.

9. That excessive publication or administrative malice destroy the legal protection of privilege.

Implications

Clearly it is the duty of the educational administrator to communicate. It is inevitable that the subject matter of complaints, evaluation or personal files will, on occasion, be defamatory. The concepts of law as above noted and the duties of the educational administrator give rise to the following implications in an educational context:

1. To receive information is not per-se an act liable to legal consequence. It is to the question of privilege that implications arise. An educator who receives defamatory information about students, parents or teachers must have a duty to receive such information in order to assure privilege as a protection for publication.

2. It is clear that educational administrators must maintain custody of files. This implies that such custody must be adequate and that unauthorized access to files containing defamatory material must be restricted.

3. To transmit information is often-times the responsibility of the educational administrator. It is his duty to report and this places him in the position of a publisher. Implications arise when reports are made to those who do not

have the right to hear such information. In educational terms, this affects communication between administrators and parents, administrators and students, administrators and teachers, and administrators to other officials. The implication is simply that the person transmitting must take care so that only those who have a duty to receive become aware at the subject matter of communication.

4. To transmit maliciously or excessively is to destroy privilege. This implies that administrators must not let their personal feelings determine degree of publication. In addition, the amount of publication, the distribution of copies of material are all matters that must be considered prior to publication.

<u>Suggested Administrative Practices</u>

1. Those who receive information must clearly have the right to receive such information. Thus the educational organization must clearly define the duties of its various members. The formal channels for communication must be clear-cut and well defined.

2. Upon receipt of information which is defamatory no response should be made in terms of providing further information to the originator who in law may not have a duty to hear. A procedure for writing down such information should be developed. It is not all typists who are protected by privilege and the use of a selected discreet typist is required.

3. Files containing such material should be kept in locked files, and access to such files should be limited.

4. Files should be reviewed so that defamatory material is destroyed after need for its use has ended. Careful destruction procedures are required.

5. Procedures as to distribution of defamatory material need to be developed since excessive publication destroys privilege.

6. Justification as a defence must be proven by the publisher. Thus some procedures to assure the truth of the matter is essential. An allegation which is defamatory made directly to the person concerned is not publishing and provides a means of confirming or exploring derogatory information.

Decision-Making and Administrative Law

A consolidation of the legal principles which relate to decision-making as performed by educational administrators starts from a consideration of the legal nature of the power to decide. In brief, such power is legally perceived in one of two ways:

1. As a judicial power.
2. As an administrative power.

It is this latter power, i.e. the power to decide on matters of policy that is the specific power that is considered in Chapter Three. It is the rules of administrative law as they are applied to the administrative power to decide that provides the legal context for the first section of that chapter. In brief, those rules of administrative law concern three topics:

1. The rule which defines occasions requiring the use of quasi-judicial processes in the exercise of decision-making powers. In other words there are times when the purely administrative process in the exercising of decision-making powers is legally inadequate.

2. The principles of natural justice and their relationships to the quasi-judicial processes.

3. The legal concept of reasonableness as it relates to the purely administrative (discretionary) process of exercising an administrative power.

The latter part of Chapter Three leads to the proposition that educational administrators decide matters in a context which allows legal challenge in courts of law. Those who would challenge have access to legal remedies. The scope and nature of these remedies is summarized and noted below:

1. The remedy of appeal. Its scope is dependent upon statutory

enactment.

2. The remedies provided by writs of prohibition and certiorari (which may prohit or set aside the decision of an educational administrator) are limited. The law will only apply the remedies in cases wherein the quasi-judicial process is legally required and wherein such processes are improperly performed.

3. The remedy compelling that a decision be made is available to those who seek performance of decision-making processes. This remedy known by its legal name of mandamus is designed to present unlawful procrastination in the exercise of decision-making power.

4. The equitable remedies of injunction and/or declaratory judgement can prevent decision implementation, or test decision legality. The scope of the remedies is wide but the matter of legal technicality and interpretation is complicated and ambiguous.

5. Modern law may support an action against the administrator who displays malice in the decision-making process.

Implications

These legal components applied to circumstances faced by educational administrators give rise to several implications of importance:

1. Educational administrators must question the nature of the decision facing them. Does it affect a right? Does it affect the right of a student? Does it affect the right of a teacher? Does it affect the right of a parent? Does it affect the right of a taxpayer?

2. Educational administrators must be aware of principles of natural justice and be aware of those occasions of decision-making requiring adherence to those principles.

3. Educational administrators must be aware of the need to decide in a reasonable manner even when the rules of natural justice need not be adhered to.

4. Educational administrators must recognize the possibility of the court examining their processes of decision-making

and hence be prepared to justify administrative procedures used in arriving at the decision concerned.

Suggested Recommended Administrative Practices

1. Clearly the irreconcilability which exists between the Dirks and Cardinal case implies that legal advice be sought as to the manner of proceeding in situations where rights may be affected.
2. Where legal doubt exists as to the lawfulness of a proposed decision educational administrators can seek a declaratory judgement.
3. The principles of natural justice imply that procedures be adopted for providing adequate notice to concerned persons. Registered mail or personal service of documents is suggested. Procedures to establish proof of such services should be followed. Affidavits of service are generally acceptable.
4. Procedures should be developed, published and followed when hearings are required. Legal advice as to the adequacy of such procedures should be obtained.

Peter Doe and Canadian Law

Chapter Four speculates as to the impact of a "Peter Doe" case upon educational law in Canada. The constitutional aspects are noted briefly. The major speculation, however, focuses upon a modern legal concept of professional negligence. Traditionally,the laws of general negligence, rather than of professional negligence, have been the legal measure of the standard of care required of educators. The legal questions of that chapter are noted below:

1. Is education a civil right? Modern writers have noted the legal complexities which surround the placing of civil rights to an education within a constitutional framework.
2. What is the required level of standard of care? Clearly earlier studies have presented a case which established the traditional standard of care as apropos to educational negligence i.e. a standard of care required of an ordinary

man. Chapter Four speculates that the traditional standard is limited to negligent circumstances which result in physical harm. The speculation of Chapter Four in following the facts of the Peter Doe case is, simply, that a higher standard of care is required in performance of professional tasks by educators and that negligence in their performance may lead to a harm which is as legally objectionable as physical harm.

3. What kinds of harm are actionable? Traditionally, educational administrators have been concerned about those cases which result in physical injury. Chapter Four speculates about the legal impact of nonphysical harms, specifically on economic harm. It suggests that a liability to a student may well exist when a student suffers a loss of earning potential due to inadequate provision of educational programs. The suggestion is simply that Canadian tort law is seeking a wider and more liberal concept of harm than is suggested by the earlier cases.

Implications

The above noted legal speculations give rise to implications of importance to educational administrators working in the Canadian context:

1. Clearly the impact of the Canadian constitution upon the rights inherent to an education is unclear. This is in direct contrast to the impact of the Constitution of the United States as it relates to educational matters. This simply implies that Canadian educational administrators cannot look to the many cases of a constitutional nature which have occured in the United States for legal guidance.

2. Clearly educational administrators must exercise skills at a level reasonably expected of them as professional persons. The educational administrator must professionally respond as the discipline of educational administration expands both in knowledge and technique.

3. The hiring and placement of educational personnel is legally significant. To place an unqualified person in a professional position demanding high qualifications is to invite legal difficulty.

4. It is no longer sufficient simply for educational administrators to maintain a vigilance to prevent occurrence of physical harm. The implication is, simply, that a vigilance is required to prevent economic, social, psychological, or cultural harm occurring to students by reason of inadequate performance of teaching, supervision or administrative skills.

Suggested Practices

The following list of suggested practices is essential if the problems, both legal and educational, as posed by the Peter Doe case are to be met.

1. Hiring and placement activities must emphasize scrutiny of professional qualifications, scrutiny of levels of performance in previous job situations, a monitoring of new staff during orientation or pre-employment training periods, and finally adequate evaluation procedures.

2. Professional tasks must be analyzed. The process of analysis must include acceptable performance levels as expected by the educational profession. In other words, the expectations imposed by a professional position must be made known to those who occupy those positions.

3. Professional standards are not absolute and educational administrators must provide upgrading programs both for themselves and others as professional standards change and develop.

4. Educational administrators must develop monitoring practices, which not only record student progress, but also detect harms occurring to students.

5. It follows that educational administrators must be prepared to present programs which either eradicate or at least alleviate such harm as it occurs to students.

Topics Suggested for Future Study

This study has continued a line of research into matters of educational law in Canada. Indeed, the "raison d'etre" for this work has its origins from within the earlier works of Bargen (1961). In

general, Canadian education law and in particular that part of educational law which is relevant to educational administrators is developing and changing constantly. Much remains to be done in identifying, analyzing and clarifying educational concerns in terms of Canadian law. Some of the more important concerns are noted below as topics worthy of consideration for future research and study.

Constitutional Issues

This thesis noted the confusion surrounding the issue of the right to an education as a civil right in terms of Canadian law. Clearly this topic needs further classification in the legal sense. In particular, two educational problems of current concern have arisen as matters of civil right and warrant further study:

1. What is the constitutional position of those students or parents who claim a civil right to attend schools not recognized by provincial law? In Alberta, Mennonite pupils and parents seek a civil right to attend schools where instruction is provided by non certified teachers. Is there a civil right to such an alternative education?
2. What is the nature and extent of the civil right of students who by reason of mental, physical, or social disability are presently denied access to educational institutions? Is the civil right to an education an absolute one?

Communication Issues

The laws of libel and slander illustrate the liability owed to a defamed person by a publisher. The impact of other laws as they relate to the receipt, custody and transmittal of personal information remains to be identified. In particular the following questions remain to be studied:

1. What is the impact of "Human Rights" legislation upon disclosure and transmittal of personal information? Can student misdemeanour failure or personality traits be transmitted to or by educational officials? Can the private moral practices of teachers be communicated? How does the fair employment legislation impinge upon the the interviewers or employees rights to know certain information? All of these questions arise in the course of an educational administrator's tasks.

2. To what extent does the law of negligence as it occurs by negligent use of words, affect educational communications? What liability exists for negligently drawn-up reports by educational officials?

Legal Issues of Decision-Making

Chapter Three outlined and applied the general principles of administrative law as that law pointed to the processes required to be performed in making decisions. The impact of other legal restraints remain to be studied and related to matters of educational administration. Two specific questions warrant study and research:

1. What is the impact of the various Provincial Planning A cts upon the educational administrator's powers to decide?

2. What is the impact of the various Ombudsmen statutes upon the educational administrator's power to decide?

New Horizons in Educational Negligence

Chapter Four suggested that negligence in performance of professional educational skills goes beyond the rules of general negligence. The chapter speculated as to the degree of standard of care required of the professional educational administrator. Peter Doe was analyzed in terms of tort law. It follows that a further study will be required to continue this line of legal research to test the validity of the speculations suggested in Chapter Four. In

particular, the following questions need further scrutiny:

1. Will the courts impose a concept of malpractice in cases concerning educators in general and educational administrators in particular?

2. Will Canadian courts consider nonphysical harm as an actionable wrong?

3. What is the extent of the duty owing to a student or parent under circumstances of the performance contracting method of providing programs?

My first hope in the writing of this thesis was to make some legal knowledge known to those who would read this work. I hoped to develop within the reader an awareness of the rule of law, an awareness of its application to specific matters and an awareness of the need to foresee changes in educational law.

It is my second hope that those who inspire educational administrators at universities would see fit to impress upon those who learn, that sensitivity to rule of law is essential to sound educational administration.

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APPENDIX A

LAW REPORTS REFERENCE KEY

Canada

A.C.	Canadian Reports Appeal Cases
Alta. L.R.	Alberta Law Reports
B.C.R.	British Columbia Reports
C.C.C.	Canadian Criminal Cases
D.L.R.	Dominion Law Reports
E.L.R.	Eastern Law Reports
Man. R.	Manitoba Reports
M.P.R.	Maritime Provinces Reports
N.L.R.	Newfoundland Law Reports
N.S.R.	Nova Scotia Reports
O.A.R.	Ontario Appeal Reports
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports
O.W.N.	Ontario Weekly Notes
O.W.R.	Ontario Weekly Reports
Que. K.B.	Quebec Kings Bench Reports
Que. Q.B.	Quebec Queens Bench Reports
Que. S.C.	Quebec Superior Court Reports
Sask. L.R.	Saskatchewan Law Reports
S.C.R.	Supreme Court Reports

Canada Con't.

Terr L.R.	Territories Law Reports
U.C.C.P.	Upper Canada Common Reports
U.C.Q.B.	Upper Canada Queens Bench
W.L.R.	Western Law Reporter
W.W.R.	Western Weekly Reports

Australia

V.L.R.	Victoria Law Reports

England

All E.R.	All England Reports
Q.B.D.	Queens Bench Division
Q.B.	Queens Bench
M & S	Maxwell and Saunders
T.L.R.	Times Law Reports
L.R.	Law Reports
L.J.Q.B.	Law Journal Queens Bench
A.C.	Appeal Cases
J.P.	Journal of Peas
K.B.	Kings Bench